140-678

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 250.

OCTOBER TERM, 1890.

F. W. COTZHAUSEN, PLAINTIFF IN ERROR,

vs.

FRANK KERTING.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED OCTOBER 17, 1887.

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INDEX.

	Original.	Print.
Caption	1	1
Præcipe for summons	2	1
Summons	2	1
Complaint	3	2
Appearance for defendant	6	3
Answer	7	4
Demurrer and reply	20	9
Order taking demurrer under advisement	21	9
Order sustaining demurrer, &c.	22	10
Amendment to second counter-claim of answer	22	10
Reply	23	11
Order commencing trial by the court on stipulation waiving jury	24	11
Order taking motion to amend reply under advisement	25	12
Order as to filing amended reply	25	12
Amended reply to first counter-claim	26	12
Order continuing trial	28	13
Order taking case under advisement	28	13
Order finding for plaintiff	29	14
Findings of the court	29	14
Motion for rehearing	31	15
Order taking motion for rehearing under advisement	35	17
Order overruling motion for rehearing	35	17
Judgment	36	17

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	Original.	Print.
Motion for new trial	36	18
Order overruling motion for new trial	37	18
Opinion of the court	38	18
Supersedeas bond	56	28
Order to serve bill of exceptions on plaintiff	59	29
Order granting time to plaintiff to submit amendments to bill of exceptions	59	29
Bill of exceptions	60	29
Statement of evidence	60	29
Testimony of defendant	61	30
Bill of sale	64	32
Agreement of trustee, November 18, 1879	65	32
Testimony of defendant continued	67	34
Letter Cotzhausen to Baldwin, November 19, 1879	69	35
Testimony of defendant continued	71	36
Agreement of February 28, 1880	72	37
Testimony of defendant continued	73	37
Bill of complaint	75	38
Answer	76	39
Findings	79	41
Testimony of plaintiff	81	42
Testimony of defendant (recalled)	88	46
Judge's certificate	88	47
Clerk's certificate	89	47
Writ of error	90	47
Citation	91	48

1 Circuit Court of the United States for the Eastern District of Wisconsin.

UNITED STATES OF AMERICA, *Eastern District of Wisconsin,* } ss:

At a stated term of the circuit court of the United States for the eastern district of Wisconsin, begun and held, according to law, at the city of Milwaukee, in said district, on the first Monday (being the third day) of January, A. D. 1887—present, the Honorable Charles E. Dyer, district judge, presiding; Francis H. West, marshal, and Edward Kurtz, clerk—among other, the following proceedings were had, to wit:

FRANK KERTING *vs.* F. W. COTZHAUSEN. } At Law.

Be it remembered that heretofore, to wit, on the 14th day of June, A. D. 1886, came the above-named Frank Kerting, plaintiff, by his attorney, Mr. Hazelton, and filed his præcipe for a summons against the above-named defendant, F. W. Cotzhausen, together with his complaint, to be served, and bond for costs approved by the clerk; which præcipe is as follows, to wit:

2 *Præcipe for Summons.*

Circuit Court of the United States for the Eastern District of Wisconsin.

FRANK KERTING, Pl'ff, *vs.* F. W. COTZHAUSEN, Def't.

Issue a summons in the above-entitled cause, complaint served.

G. W. HAZELTON,
Plaintiff's Attorney.

To Edward Kurtz, clerk.

Whereupon a summons issued, returnable according to law, with said complaint annexed, as follows, to wit:

Summons.

Circuit Court of the United States for the Eastern District of Wisconsin.

FRANK KERTING, Plaintiff, *vs.* F. W. COTZHAUSEN, Defendant.

The President of the United States of America to the said defendant:

You are hereby summoned to appear within twenty days after

service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid; and in case of your failure so to do judgment will be rendered against you according to the demand of the complaint, of which a copy is herewith served upon you.

3 The marshal of said district is hereby commanded to serve this summons and make due return thereto.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the said eastern district of Wisconsin, this 14th day of June, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the 110th.

EDWARD KURTZ, *Clerk.*

G. W. HAZELTON,
Plaintiff's Attorney; P. O. Address, Milwaukee, Wis.

Complaint Annexed to Summons.

In the United States Circuit Court, Eastern District of Wisconsin.

FRANK KERTING, Pl'ff,
vs.
F. W. COTZHAUSEN, Def't.

The complaint of the plaintiff above named respectfully shows and alleges that the plaintiff is and long has been a resident and citizen of the State of Illinois, and that the defendant is and long has been a resident and citizen of the State of Wisconsin.

That heretofore, to wit, on or about the 20th day of February, A. D. 1884, the plaintiff filed a præcipe for summons in the superior court of Cook county, in the State of Illinois, being a court of

4 general jurisdiction, for the commencement of an action in his favor against the above-named defendant, and that thereupon a summons in due form of law was issued by and out of said court in said action and the same was thereafter and on the same day served personally on the said defendant, pursuant to law; that thereby an action at law was duly commenced against the said defendant in favor of this plaintiff in said court and was pending therein.

That thereafter the defendant took due and timely steps to remove the said action to the circuit court of the United States for the northern district of Illinois and the same was, on or about the 5th day of March, A. D. 1884, duly removed and transferred from the said superior court, pursuant to law, to the circuit court of the United States for the northern district of Illinois and became and was an action at law between this plaintiff and this defendant pending in the latter court.

That issue was duly joined in the said action after being so removed, the defendant appearing and being represented by his attorneys therein; that such proceedings were thereupon and thereafter

had in said action that the plaintiff, by the consideration and
5 judgment of the last-named court, upon and after trial and the verdict of a jury, obtained and recovered a judgment against said defendant, F. W. Cotzhausen, on or about the 24th day of November, A. D. 1885, for the sum of two thousand dollars damages and fifty-nine dollars and fifty cents costs, making in the aggregate the sum of two thousand fifty-nine $\frac{50}{100}$ dollars, in which sum the said defendant was thereby duly adjudged by the said circuit court of the United States for the northern district of Illinois to be indebted to the plaintiff.

That the said court had at the time of such judgment full jurisdiction and authority to make the same, and that the same was duly made and entered and has since been and now is a valid judgment of said court in said action for said sum.

That no part thereof has been paid.

Wherefore the plaintiff demands judgment against the defendant for the amount of said judgment, with interest and costs.

G. W. HAZELTON,
Pl'ff's Att'y.

EASTERN DISTRICT OF WISCONSIN, *ss:*

G. W. Hazelton, being duly sworn, says he is the attorney for the plaintiff in the within-entitled action and makes this affidavit
6 in his behalf; that he knows the contents of the within & foregoing complaint, and that the same is true of his own knowledge except as to the matters stated on information and belief, and as to these he believes the same true; that the action is founded on a judgment as within alleged, & that the record of said judgment, duly certified, is in his hands; that his information in the premises is derived from said judgment record and from information derived from the attorneys of the pl'ff in the action in which such judgment was rendered, and that the reason the plaintiff does not make this affidavit is that he is not within this district.

G. W. HAZELTON.

Subscribed & sworn to before me this 3d day of June, 1886.
EDWARD KURTZ, *Clerk.*

And same day came Messrs. Cotzhausen, Sylvester, Scheiber & Sloan and filed their notice of retainer and appearance for the defendant as follows:

Appearance of Defendant.

U. S. Circuit Court, East. Dist. of Wis.

FRANK KERTING, Plaintiff,
vs.
F. W. COTZHAUSEN, Defendant.

Please take notice that we are retained by and appear for
7 the defendant, F. W. Cotzhausen, in the above-entitled action.

Dated Milwaukee, June 14, 1886.
Yours, &c.

COTZHAUSEN, SYLVESTER,
SCHEIBER & SLOAN,
Attorneys for Defendant.

July 14, 1886.—This day came the defendant, by his attorney, Mr. Sloan, and filed his answer as follows:

Answer.

United States Circuit Court, Eastern District of Wisconsin.

FRANK KERTING, Plaintiff,
vs.
F. W. COTZHAUSEN, Defendant.

And now comes the defendant and answers the complaint of the plaintiff as follows, to wit:

By way of defense this defendant shows to the court that the said pretended judgment and record — indebtedness herein complained of was procured by fraud and perjury on part of the plaintiff and certain other parties conspiring and combining with him for that purpose, and in that behalf this defendant avers and alleges that on or about the 25th day of September, A. D. 1880, at the city of Chicago, he caused to be duly foreclosed two certain chattel mortgages given by the American Oleograph Company covering a large stock
of mortgaged chattels, several thousand in number, used and
8 employed in carrying on a lithographing and engraving business under the name of "The Chicago Lithographing Company;" that for a long time theretofore the plaintiff had been in the possession, control, and management of said business and property, using and operating the same as if they were his own; that on foreclosure it was ascertained that a number of the mortgaged chattels were removed from the premises and missing, among which lithographing stones and other articles of great value; that on the sale there remained a deficiency of $5,147.58, which still remains unpaid; that when ousted by said sale strenuous efforts were made by the plaintiff, extending over a number of years, in a variety of legal proceedings instituted against this defendant, his law partner, and his local attorney and agent who conducted said foreclosure sale, to set aside and invalidate the same, and thus to recover possession of said business and property, but that all of said proceedings proved fruitless and unavailing; that having failed in his efforts in this direction the plaintiff filed, in February, 1884, his
præcipe for summons in the superior court of Cook county,
9 State of Illinois, against this defendant, who had become the purchaser of the mortgaged property at the foreclosure sale, and in said suit thus instituted (being the same referred to in the plaintiff's complaint herein) he charged in his complaint trespass *vi et armis* this defendant with having unlawfully taken and carried

away on the 25th day of September, 1880, a large amount of personal property said to belong to him (said plaintiff) individually, among which some forty or fifty lithographing stones, a color-grinder, a varnish machine, a paper-cutter, a desk, counter, and chairs, a lot of electrotypes, pictures, chromos, some work in process of being finished, and other small chattels.

That said suit was subsequently removed to the United States circuit court for the northern district of Illinois, as stated in the plaintiff's complaint, and being at issue in said court and coming on to be tried before a jury in that behalf duly taken and sworn between said parties, and upon the trial of said issue the said Frank Kerting did then appear and tender himself and was received to give evidence on behalf of himself, and did then take his corporal oath and was duly sworn, and then and upon the trial of said issue it became and was a material question in the same whether,
10 after the foreclosure sale, the plaintiff Kerting made a demand upon this defendant for any of the property which he thus individually claimed outside of the mortgaged chattels, and whether he fairly disclosed to this defendant his claim of title thereto, and thereupon the said Kerting, being so sworn as aforesaid, devising and wickedly intending to cause and procure a verdict to pass for him, did then and there falsely, wilfully, and corruptly depose and give evidence in substance and to the effect that he made demand for said property because not embraced in said mortgages and was refused possession thereof, whereas in truth and in fact he never made any such demand or in any other manner laid claim to any of the property above referred to nor ever disclosed his right or claim of right to any portion thereof except by contesting and impeaching the foreclosure sale generally.

Furthermore, then and there, upon the trial of said issue, this defendant, among other things, claimed title in himself under and by virtue of a sheriff's sale on judgment and execution in the case of The Butler Paper Company *vs.* Frank Kerting and the
11 Chicago Lithographing Company, all of which duly appeared from the records and files of the court wherein said judgment was rendered, and it became and was under the ruling of the presiding judge a material question on said issue and trial whether this execution levy prior to the sale was abandoned by the judgment creditor and whether said sale, thus regularly appearing of record, was fictitious or *bona fide*, and consequently whether the title of said Kerting, if any he ever had, to the property above referred to had become extinguished by such sale; and thereupon the said Kerting, devising and wickedly intending to cause and procure a verdict to pass for him, did then and there by his own corporal oath and that of the president of the judgment creditor, conspiring and conniving with him for that purpose, falsely, wilfully, and corruptly depose and give evidence and thus made it to appear in substance and effect that said levy was withdrawn and abandoned, that no sale on execution was in fact made, and no money realized, as purported by the record, and that the pretended proceedings were fictitious, whereas in truth and in fact the return of the sheriff as to his levy

and sale was true, in every particular correct, and in con-
12 formity to the facts as they occurred and transpired at the time, so that all right, title, and interest of said Frank Kerting, if any such he ever had, were fully extinguished by such sale and acquired by this defendant.

And this defendant further shows that at the time of foreclosure of said chattel mortgage and for several months thereafter this defendant had no possession or control, directly or indirectly, actual or constructive, over the greater portion of the goods and chattels said to have been taken and carried away by this defendant; that the color-grinder, varnish machine, paper-cutter, the labels, and the work in process of execution were then held and claimed by third parties, strangers to this defendant, in manner following, to wit:

The color-grinder, varnish machine, and two bundles of labels, containing about 2,500 sheets, had been seized and taken and were then held under a writ of attachment against said plaintiff at the suit of one Otto Waltersdorff, and were afterwards, to wit, on the 21st day of October, 1880, sold on execution to satisfy the claim of said Waltersdorff, amounting to one hundred and sixty-five dollars, more or less, and purchased from him, said Waltersdorff, under date of October 22,
1880, for the sum of one hundred thirty-seven dollars forty-three
13 cents ($137.43) then to him in hand paid; that the paper-cutter was held by Goodwillie, Wyman & Co., who had repossessed themselves of the same because Kerting did not comply with the terms of a conditional sale under which he had acquired possession, and had paid but an insignificant amount on account of the purchase-money thereof; that said paper-cutter did not come under the control of this defendant until on or about October 30, 1880, when he bought the same from the above firm in consideration of $200 to them then in hand paid; that the work in process of execution was assigned by the plaintiff himself, on or about September 24, 1880, to one of the press hands for the purpose of having the same finished and the net proceeds thereof applied to the payment of wages then due to the employees of the shop; that the electrotypes and wood cuts referred to as having been taken and carried away never came to the hands or knowledge of this defendant until several years thereafter, when a box containing the same was found by employees of the shop stored away on the top of a stone rack, upon discovery whereof the same were at once tendered to the plaintiff, who, however, refused to accept the same; that
no chromos, views, or anything of the kind have come to
14 the possession of this defendant unless it be intermixed with mortgaged goods of the same kind or character, and that no use of any such stuff was ever made by this defendant because utterly worthless and of no commercial value; that all of these facts, matters, and things were well known to the plaintiff, but that then and there, upon said trial and when all of the above matters were material to the issue, the said Kerting, devising and wickedly intending to cause and procure a verdict to pass for him, did make it falsely and fraudulently appear by his oath and testimony and the testimony of said Otto Waltersdorff, then conspiring and con-

niving with him for that purpose, that the execution sale of the color-grinder, varnish machine, and labels in the case of Waltersdorff *vs.* Kerting was fraudulent and void for the reason that the judgment debt was collected and paid between the time of the levy and the execution sale; that the plaintiff had absolute title to the paper-cutter, and that the sale of the same had not been conditional, as claimed and asserted on the defense; that he, said Kerting, had not disposed of any of the goods, chattels, and things said to
15 have been thus wrongfully taken, carried away, and converted by this defendant, and that said property was of large value, whereas in truth and in fact the judgment of said Waltersdorff had not been paid, the paper-cutter was conditionally bought and only twenty or twenty-five per cent. paid thereon, the press-work had been assigned as aforesaid, and the whole interest of the said plaintiff in and to the entire property, if any he individually owned, was but nominal and not worth to exceed in the aggregate fifty dollars; all of which said plaintiff well knew as aforesaid.

But that by means of snch machinations, fraud, and false statements then and thus made and given said Kerting secured a verdict at the hands of the jury for two thousand dollars damages, upon which judgment was afterwards entered, as set forth in the complaint.

Wherefore this defendant prays that the plaintiff take nothing by his suit, and that his complaint be dismissed with costs.

And, by way of counter-claim, this defendant respectfully shows to this honorable court that on or about the 19th day of November, A. D. 1879, this defendant was the lawful owner of a certain note and chattel mortgage bearing date the 17th day of September, A. D. 1879, executed by the American Oleograph Company to
16 George Sylvester in trust for this defendant and other parties; that the same covered the whole stock of machinery, tools, implements, goods, wares, and merchandise used and employed by the mortgagor in carrying on a lithographing and engraving business, the value of which was far in excess of the amount of said indebtedness, and of a certain prior mortgage lien thereon, held by the Cleveland Paper Company, namely, of the value of upwards of $20,000.

That on or about the day aforesaid, by reason of default in the conditions of said chattel mortgage, this defendant caused possession to be taken of the mortgaged premises for the purpose of foreclosure, when the above-named plaintiff, who then was a stranger to this defendant, requested forbearance and an extension of the debt, so as to give himself an opportunity to assume, reorganize, and continue said lithographing business and purchase the same, with its good will, from the mortgagor subject to the existing liens; that the said request was assented to by this defendant, the foreclosure proceedings were abandoned, an extension or credit agreed upon, and said mortgaged property, with all appurtenances, and
17 the good will of said business was thereupon vested in a new corporation or firm in which the plaintiff then and there assumed the controlling interest and management, and

that in consideration thereof the plaintiff agreed to pay and discharge the amount owing to this defendant in the manner and at the time specified in said second mortgage; that in order to carry out and secure his said undertaking the above-named plaintiff then and there paid this defendant the sum of $1,500 on account, besides the costs of foreclosure; and, furthermore, he caused to be deeded to said George Sylvester, in trust for this defendant, certain real estate in the city of Chicago as further security to the indebtedness thus assumed and contracted, and the said plaintiff was thereupon let by the mortgagor and this defendant into the possession of the entire business and of all the mortgaged property; that said lithographing business was thereafter continued by the plaintiff under the firm or corporate name of "The Chicago Lithographing Company" until the month of September, 1880, when, by reason of his failure to meet with the conditions of the prior mortgage, on which there was then still due and owing the sum of $4,460.82, said
18 mortgage lien became foreclosed, and on such foreclosure it was ascertained that a number of the most valuable lithographing stones, a boiler and engine, several of the choicest oil paintings, and a variety of other articles covered by said mortgages had been abstracted and removed from the premises and were then missing, and that the mortgaged stock and property had largely depreciated in value in consequence of careless handling and ill-usage, so that the same became utterly inadequate to pay or secure the liens thereupon; that when the foreclosure sale took place, to wit, on the 25th day of September, A. D. 1880, the property was at first struck off to said plaintiff at a sum less by about one thousand dollars than the amount of the aggregate liens, but, in consequence of his inability or neglect to pay even a small percentage to make good his bid, the mortgaged property was offered again for sale and the proceeds thereof first applied to the expenses of foreclosure; secondly, to the extinguishment of the first chattel mortgage debt, and, thirdly, to the second chattel mortgage lien as far as applicable, and there remained a deficiency or balance still due to this defendant under date of September 25, 1880, of $5,147.58.

19 And this defendant further shows to this honorable court that the title to the real estate above referred to and turned over by said plaintiff as further collateral to his undertaking has failed in consequence of the plaintiff's wife claiming and asserting title thereto on the ground that the same was her sole and separate property when thus conveyed as aforesaid; so that said real-estate security also became unavailable to this defendant and is now entirely worthless.

That by reason of said premises the plaintiff now is justly and truly indebted to this defendant in the sum of $5,147.58, with interest from the 25th day of September, A. D. 1880.

And, by way of further counter-claim, this defendant shows to the court that the plaintiff is indebted to him upon various judgments and records of court now remaining unpaid and undischarged as follows:

United States circuit court, northern district of Illinois, in the case

of Frank Kerting *vs.* F. W. Cotzhausen *et al.*, judgment of dismissal January 25, 1884; costs, $31.80.

Circuit court, Cook county, in the case of Frank Kerting *vs.* American Oleograph Company *et al.*, judgment of dismissal May 16, 1882; costs, $7.65.

Wherefore the defendant further prays that he have judg-
20 ment against the plaintiff for the amount of the several counter-claims above stated, with interest and costs of suit.

H. C. SLOAN,
Defendant's Attorney.

STATE OF WISCONSIN, } ss :
Milwaukee County, }

F. W. Cotzhausen, being duly sworn, says he is the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

F. W. COTZHAUSEN.

Subscribed and sworn to before me this 14th day of July, 1886.
[SEAL.] JOHN THIEMANN,
Notary Public, Mil. Co., Wis.

July 23, 1886.—This day came the plaintiff, by his attorneys, Messrs. Hazelton & Herdegen, and filed his demurrer and reply as follows:

Demurrer & Reply.

U. S. Circuit Court, E. Dist. of Wisconsin.

FRANK KERTING, Plaintiff, }
vs.
F. W. COTZHAUSEN, Defendant. }

The plaintiff demurs to all that part of the defendant's an-
21 swer which precedes the allegations touching a counter-claim, being all of said answer down to and ending with the words "that his complaint be dismissed with costs," in the 16th folio, for the reason and on the ground that the same does not state and set forth facts sufficient to constitute a valid and legal defense to the complaint herein.

And the plaintiff denies each and every allegation in the said answer set forth by way of counter-claim, commencing with the words "and by way of counter-claim," in the 16th folio, and ending with the words "25th day of Sept., A. D. 1880," in folio 23.

And the plaintiff demurs to the further or second counter-claim in said answer, commencing with the 24th folio and ending with the last words and figures contained in said answer preceding the final prayer therein, for the reason that it appears upon the face

thereof that the same does not state facts sufficient to constitute a cause of action or a defense to the complaint or any part thereof.

HAZELTON & HERDEGEN,
Plaintiff's Attorneys.

I certify that, in my opinion, the within demurrer is well founded. July 23d, 1886.

G. W. HAZELTON,
Att'y & Counsellor.

22 October 5, 1886.—This day came the parties, by their counsel, and the demurrer of the plaintiff to the answer and second counter-claim of the defendant came on to be heard, and was argued by Mr. Hazelton for the plaintiff and by Mr. Sloan for the defendant and submitted, when the court took the same under consideration.

Order Sustaining Demurrer.

October 8, 1886.—This day came the parties, by their counsel, and on consideration of the demurrer of the plaintiff to the answer by way of defense and to the second counter-claim of the defendant, it is ordered by the court that said demurrer be, and hereby is, sustained, with leave to the defendant to amend said counter-claim within three days.

And came the defendant, by his attorney, and filed exceptions to said order.

October 9, 1886.—This day came the defendant, by his attorney, and filed an amendment to the second counter-claim of his answer, as follows:

Amendment to Second Counter-Claim.

United States Circuit Court, Eastern District of Wisconsin.

FRANK KERTING
vs.
FREDERICK W. COTZHAUSEN. } At Law.

23 And now comes the defendant and amends the second counter-claim of his answer by adding at the end thereof, immediately preceding the prayer for judgment, the following words: That the first of the above-named suits in which judgment was thus rendered as aforesaid, although in form against this defendant and other parties, was in fact defended by F. W. Cotzhausen alone, and when dismissed judgment passed in his favor for the costs of suit as aforesaid.

That in the second of the cases above mentioned, which was on the equity side of the court, various other parties aside from this defendant had been joined upon the record as defendants therein, and that, as in the previous case, the defense was really made by this de-

fendant alone, and when dismissed judgment passed in his favor for the costs aforesaid.

H. C. SLOAN,
Defendant's Attorney.

October 14, 1886.—This day came the plaintiff, by his attorneys, and filed his reply as follows:

Reply.

In the United States Circuit Court, Eastern District of Wisconsin.

FRANK KERTING
vs.
F. W. COTZHAUSEN.

24 The plaintiff, for reply to the parts and portions of the answer setting forth a counter-claim in this action, this day served, by way of amendment to the answer heretofore filed herein, says that he denies each and every allegation in said amended answer and denies all the allegations touching a counter-claim herein.

Oct. 9th, 1886.

HAZELTON & HERDEGEN,
Plaintiff's Att'ys.

And now, at this same term, to wit, January term, 1887, and on the thirtieth day thereof, to wit, on the 9th day of February, A. D. 1887, the following proceedings were had, to wit:

Trial Commenced & Stipulation Waiving Jury.

FRANK KERTING
vs.
F. W. COTZHAUSEN. } At Law.

This day came the parties, by their counsel, Mr. G. W. Hazelton appearing for the plaintiff and Mr. H. C. Sloan for the defendant, and the issue herein came on to be tried, when the said parties entered into an agreement in writing, as herein filed, waiving a jury, as follows, to wit:

"It is mutually stipulated that all the issues in the above-entitled action may be tried and determined by the court without a jury. * * *

(Signed) H. C. SLOAN,
25 *Defendant's Attorney.*
G. W. HAZELTON,
Plaintiff's Attorney."

Whereupon the court proceeded to try said issue, and the trial not being concluded, the same was adjourned until Tuesday next, the 15th instant.

And afterwards, to wit, on the thirty-third day of said term, to wit, on the 12th day of February, A. D. 1887, the following proceedings were had, to wit:

Motion of Plaintiff to Amend Reply Argued.

FRANK KERTING
vs.
F. W. COTZHAUSEN. } At Law.

This day came the parties, by their counsel, and the plaintiff moved the court for leave to amend his reply, and said motion came on to be heard, and was argued by Mr. Hazelton in favor of the same, on behalf of the plaintiff, and by Mr. Sloan, in opposition, for the defendant, when the court took the same under consideration.

And afterwards, to wit, on the thirty-fourth day of said term, to wit, on the 14th day of February, A. D. 1887, the following proceedings were had, to wit:

Order as to Plaintiff Filing Amended Reply.

FRANK KERTING
vs.
F. W. COTZHAUSEN. } At Law.

This day came the parties, by their counsel, and on con-
26 sideration of the motion of the plaintiff for leave to file an amended reply it is ordered by the court that said motion, so far as the plaintiff asks to set forth the statute of limitations, be, and hereby is, overruled, and that so far as the plaintiff asks to set forth prior adjudications the said motion be, and hereby is, granted.

And same day amended reply filed as follows:

Amended Reply to First Counter-Claim of Def't.

U. S. Circuit Court, East'n Dist. Wis.

FRANK KERTING
vs.
F. W. COTZHAUSEN. }

And, for further reply to said first counter-claim of said defendant in his answer set forth, this plaintiff says that the said defendant ought not to have or sustain his said counter-claim against him, the said plaintiff, because he says that, to wit, in the January term, A. D. 1884, of the superior court of Cook county, State of Illinois, on, to wit, January 7th, A. D. 1884, at, to wit, said Cook county, in a certain cause then pending on the chancery side of said court, wherein said Frank Kerting was complainant and said F.

W. Cotzhausen and others defendants, all the matters and things mentioned & set forth in said counter-claim and each and every of them were submitted to the consideration of
27 said honorable court, and the court, upon due consideration of all the matters & things in said counter-claim set forth, on, to wit, the day and year aforesaid, at, to wit, said county of Cook, entered a final decree in said cause fully disposing of and adjudicating upon the matters and things in said counter-claim mentioned; and plaintiff avers that said Cotzhausen abided by said decree of said court in said cause, and that said decree still remains in full force and effect, not in the least reversed, satisfied, or made void except as to the sum of money therein and thereby found to be due and owing from said Kerting to the said Cotzhausen; this plaintiff avers that the same has been duly paid and satisfied, and this plaintiff avers that he has duly performed all that he was by said decree to perform; all of which by the records and proceedings of said court will more fully appear; and this the said plaintiff is ready to verify by the record; wherefore he prays judgment if the said defendant ought to have or maintain his aforesaid counter-claim against him, said plaintiff, etc.

HAZELTON & HERDEGEN,
Plaintiff's Attorneys.

28 And afterwards, to wit, on the thirty-fifth day of said term, to wit, on the 15th day of February, A. D. 1887, the following proceedings were had, to wit:

Trial Resumed.

FRANK KERTING
vs.
F. W. COTZHAUSEN } At Law.

This day came the parties, by their counsel—Messrs. G. W. Hazelton and R. S. Tuthill appearing for the plaintiff and Mr. Sloan for the defendant—and the trial of the issue herein was resumed before the court, and, not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the thirty-sixth day of said term, to wit, on the 16th day of February, A. D. 1887, the following proceedings were had, to wit:

Trial Concluded and Cause Submitted.

FRANK KERTING
vs.
F. W. COTZHAUSEN. } At Law.

This day came the parties, by their counsel, and the trial of the issue herein was resumed before the court and concluded, and the said cause being argued by said counsel upon the pleadings and

evidence and submitted, the court took the same under consideration.

29 And afterwards, to wit, on the eightieth day of said term, to wit, on the 9th day of May, A. D. 1887, the following proceedings were had, to wit:

FRANK KERTING
vs.
F. W. COTZHAUSEN. } At Law.

This day came the parties, by their counsel, and, on consideration of the pleadings and proofs in this cause and the arguments of counsel thereon, the court doth find the issue in favor of the plaintiff and doth assess the damages to the said plaintiff at the sum of two thousand two hundred and thirty-nine dollars and seventy cents, as per findings of fact and conclusions of law herein filed, as follows:

Finding of the Court.

United States Circuit Court, Eastern District of Wisconsin.

FRANK KERTING
vs.
F. W. COTZHAUSEN.

This case having come on for trial and having been tried by the court without a jury by written stipulation of the parties on file, the court now here finds the following facts to have been established on the trial:

First. On or about the 24th day of November, 1885, the plaintiff recovered a judgment against the defendant in the circuit court of the United States for the northern district of Illinois in the
30 sum of $2,059.50, which judgment was duly entered and docketed in said court, as alleged in the complaint of the plaintiff, and is the same judgment set forth in the complaint as constituting the plaintiff's cause of action.

Second. That said judgment is in full force and unreversed; that no payments have been made thereon, and that said judgment and interest thereon amounts at this date to $2,239.70.

Third. That the allegations of the complaint are true.

Fourth. That it was not established on the trial by a preponderance of evidence that the plaintiff Kerting promised and agreed to pay and discharge or that he personally assumed the payment of the indebtedness set forth in the first counter-claim contained in the defendant's answer, owing by the American Oleograph Company to the defendant, as alleged in said counter-claim.

Fifth. That it is true, as alleged in said counter-claim, that the title to the real estate alleged in said counter-claim to have been conveyed by the plaintiff Kerting to George Sylvester in trust for the defendant failed, so that said real estate as a security became

unavailable to the defendant, as alleged in said counter-claim.

31 Sixth. That no evidence was offered by the defendant in support of the second counter-claim set up in his answer, and that no liability from the plaintiff to the defendant was established by the evidence on either of the defendant's counter-claims.

And as conclusions of law the court finds—

First. That the plaintiff was at the date of the commencement of this action the owner and holder of the judgment against the defendant described in his complaint.

Second. That the defendant is not entitled to recover against the plaintiff upon either of the counter-claims set up in his answer.

Third. That the plaintiff is entitled to a judgment against the defendant for the amount claimed in his complaint, to wit, the sum of $2,059.50, with interest from Nov. 24, 1885, amounting in all to $2,239.70, together with his costs herein, to be taxed.

Dated May 9, 1887.

By the court:

CHAS. E. DYER, *Judge.*

To which finding the defendant filed exceptions.

And same day came the defendant, by his counsel, and moved the court for a rehearing for reasons filed as follows:

Motion for Rehearing.

United States Circuit Court, Eastern District of Wisconsin.

FRANK KERTING
vs.
F. W. COTZHAUSEN.

32 The opinion of the court having been announced, the defendant requests, before the formal entry of the court's finding, a reconsideration of the law and evidence in the nature of a motion for a rehearing, and assigns the following reasons in that behalf:

The court evidently proceeded upon the theory that in order to hold Kerting liable for a deficiency remaining after foreclosure sale it became necessary to show that he expressly agreed to pay and discharge the amount of the existing incumbrances. In other words, that an express promise, resting in writing or parol, but expressly made, for a valuable and independent consideration, was indispensable to a recovery in this action; and the court found that in the absence of any corroborating circumstances such an express promise was not established by a preponderance of the evidence adduced on the trial, as the assertion of the one party was opposed by an equally strong denial on the part of the other. The reasoning of the court on this point is clear and logical. It is the province of the court to form its conclusions upon the evidence, and the duty of

the parties and counsel to submit, however much they may
33 be inclined to differ; but in arriving at such conclusions the learned judge has evidently left out of mind certain material propositions clearly deducible from the evidence and borne out by fundamental principles of law.

I. It is not necessary that a promise to pay be shown by express words. If it appear from the facts and circumstances that it was the intention of the party to assume and discharge the existing incumbrances and not merely to buy an equity of redemption, then it is clearly sufficient to maintain this suit.

II. What stronger evidence of such an intent to assume and to discharge this indebtedness and the whole of it; what clearer corroborating proof could possibly be adduced than the written contract, which is in evidence, and from which it appears that Kerting pledged his individual resources, personal and real, not only to the immediate reduction of the existing lien, but to the payment of any balance that might possibly remain after exhausting the chattel-mortgage security.

III. Is it not also a strong corroborating circumstance that Kerting reserved to himself the option of turning all his payments into a purchase of the outstanding incumbrances and contracted for a subrogation to the rights of the mortgagee?

34 IV. Cases of novation and subrogation hardly ever present or involve a personal promise to pay made in explicit words; the law infers the promise or obligation to pay from the acts of the parties and the surrounding circumstances. Express promises are not necessary at all in such instances.

V. But, aside from all of the above points and propositions, conceding for the purposes of argument that the reasoning and conclusions of the court thus far indicated were unexceptionable in every respect, still there is one branch of the case which has utterly escaped attention, viz., the right of C. to recover against K. for failure of title and consideration when turning out a worthless security, and securing in consequence thereof valuable advantages to the detriment of the holder of the chattel mortgage. The real estate which was thus pledged to the payment of this debt is shown by the evidence to have been estimated at five thousand dollars ($5,000.00). There can be no question that on ground of failure of title and consideration C. is entitled to recover from K. the difference between the value of these premises and the amount of the prior existing lien thereupon.

This cause of action is fairly within the issue presented by
35 the pleadings and substantiated by the evidence, and who doubts that there ought to be a remedy?

H. C. SLOAN,
Def't's Att'y.

And afterwards, to wit, on the ninety-sixth day of said term, to wit, on the 16th day of June, A. D. 1887, the following proceedings were had, to wit:

Hearing of Motion for Rehearing.

FRANK KERTING
vs.
F. W. COTZHAUSEN. } At Law.

This day the motion of the defendant for a rehearing of this cause came on to be heard, and was argued by Mr. Sloan, in favor of the same, on behalf of the defendant, and by Mr. Hazelton, in opposition, and submitted, when the court took the same under consideration.

And afterwards, to wit, on the one hundred and first day of said term, to wit, on the 22nd day of June, A. D. 1887, the following proceedings were had, to wit:

Order Overruling Motion for Rehearing.

FRANK KERTING
vs.
F. W. COTZHAUSEN. } At Law.

This day came the parties, by their counsel, and on consideration of the motion of the defendant for a rehearing of this cause and the arguments of counsel thereon, it is ordered by the court that
36 said motion be, and hereby is, overruled; to which order the defendant filed exceptions.

Judgment.

Whereupon it is considered and adjudged by this court, now here, that the plaintiff do have and recover of the said defendant, F. W. Cotzhausen, the sum of two thousand two hundred and thirty-nine dollars and seventy cents, damages so as aforesaid assessed by the court, together with fifty-nine dollars and thirty-five cents, his costs about his said suit in this behalf by him expended, and that he have execution therefor.

Judgment-roll signed June 22nd, A. D. 1887.

EDWARD KURTZ, *Clerk.*

Damages	$2,239 70
Costs	59 35
	$2,299 05

And afterwards, to wit, on the one hundred and fourth day of said term, to wit, on the 27th day of June, A. D. 1887, the following proceedings were had, to wit:

FRANK KERTING
vs.
F. W. COTZHAUSEN. } At Law.

This day came the defendant, by his counsel, and moved the court for a new trial for reasons filed, as follows:

37 *Motion for New Trial.*

United States Circuit Court, Eastern District of Wisconsin.

FRANK KERTING, Plaintiff,
vs.
F. W. COTZHAUSEN, Defendant.

Now comes the above-named defendant, by H. C. Sloan, his attorney, and moves the court to set aside the findings of fact and conclusions of law herein, and for a new trial, on the ground—

1. That said findings of fact and conclusions of law are contrary to the evidence and the law in the case.

2. The court erred as a matter of law in not finding and determining that the defendant is entitled to recover of the plaintiff the difference between the value of the premises which were conveyed in trust as collateral security for the payment of the second chattel mortgage and the pre-existing lien of the first mortgage on the premises.

Dated June 27, 1887.

H. C. SLOAN,
Defendant's Attorney.

Order Overruling Motion for a New Trial.

And said motion having been submitted by the counsel of the parties without argument, on consideration thereof it is ordered by the court that said motion be, and hereby is, overruled; to which order the defendant filed exceptions.

38 *Opinion of the Court.*

United States Circuit Court, Eastern District of Wisconsin.

FRANK KERTING
vs.
F. W. COTZHAUSEN.

G. W. Hazelton, for plaintiff; H. C. Sloan, for defendant.

DYER, *J.:*

The plaintiff sues to recover the amount of a judgment recovered by him against the defendant on the 24th day of November, 1885, in the circuit court of the United States for the northern district of Illinois. The defendant interposes a counter-claim, and the contest between the parties arises thereon. The amount of the plaintiff's demand against the defendant is $2,059.50 and interest. The defendant asserts a claim against the plaintiff of $5,147.58 and demands a judgment in his favor for the amount of the excess of his claim over that of the plaintiff.

It appears from the testimony adduced on the trial that in 1879

the American Oleograph Company was a corporation doing business in Chicago, and on the 17th day of September of that year executed to George Sylvester, as trustee, a chattel mortgage on its stock and property to secure an indebtedness of $7,879.67 owing to the defendant Cotzhausen, which indebtedness, with interest thereon at eight per cent., was due in two years from the date of the mortgage. The defendant alleges that in November, 1879, in connection with
39 certain transactions which then took place between them, the plaintiff assumed and agreed to pay the mortgage debt, and the counter-claim in controversy is based upon this alleged personal assumption by the plaintiff of the indebtedness secured by said mortgage.

The various transactions which have a bearing upon the principal question of fact in controversy, as we get them from the concurrent testimony of the parties and the documentary evidence, may be stated as follows:

The oleograph company had on the 17th day of July, 1879, executed to the Cleveland Paper Company a chattel mortgage on its stock and property to secure the payment of the sum of $10,000, due, with interest, in one year from the date of the mortgage. This mortgage was, therefore, prior in date to that held by Sylvester, trustee, the first falling due July 17th, 1880, and the other September 17th, 1881. Both mortgages and the notes secured thereby were executed by the oleograph company by S. B. Munson, Jr., president, and E. C. Thurber, secretary. On the note secured by the mortgage executed to Sylvester, trustee, there was written an endorsement as follows: "As long as $75 a week is paid on this note no action shall be taken thereon;" and payments of $75 each, made September 26, October 3, October 11, October 18, October 27, and November 3, 1879, are endorsed on the note.

Early in November the company became unable to make further payments on its indebtedness, and the developments then made indicated quite clearly that it could not proceed with its business without a reorganization on a more substantial basis. It was
40 at the same time believed that the assets of the company, covered by the mortgages spoken of, were more than adequate security for the payment of the indebtedness if the business could be kept on foot and the expenses reduced. The managing officers in charge endeavored to reorganize and had correspondence with the defendant, who was anxious that new parties of experience and integrity should be brought into the concern. These efforts, however, failed. Thereupon the defendant went to Chicago and placed a custodian in possession of the mortgaged property, as the mortgage held for his benefit authorized the mortgagee to do in case he should at any time deem himself insecure. He there had various conferences with Munson and Thurber about a reorganization of the company and a continuance of the business, and negotiations to that end were entered into with other parties by the names of Flotow and Paratsky.

It seems, or at least I infer from the evidence, that there was then in existence a corporation with which the plaintiff was then or be-

came subsequently connected, known as the Chicago Lithographing Company. The plaintiff and defendant met by means of introduction from Munson and at once entered into negotiations for the continued prosecution of the company's business. It was in these negotiations that the defendant alleges that the plaintiff promised and agreed, in consideration that the foreclosure of the mortgage should not proceed and that the plaintiff should be let into a connection with the business and should thereby be enabled to derive pecuniary benefit therefrom, to personally assume and pay the mortgage debt. The plaintiff was then carrying on a litho-
41 graphing business on his own account, in the same building occupied by the oleograph company, and was a man of experience in the business.

As a result of the negotiations the Chicago Lithographing Company was brought into the enterprise as a purchaser of the stock and property of the oleograph company, the purchase being evidenced by a written bill of sale made November 19th, 1879. This instrument is a simple conveyance, containing a recital that it is made subject to the mortgage on the property conveyed, but without any clause therein obligating the purchaser or the plaintiff to pay any part of the mortgage indebtedness.

The defendant, it seems, was very desirous that in consummating the arrangement the amount of his debt should be reduced, and to that end the plaintiff consented to execute to Sylvester, trustee, his individual note for $1,500, due in thirty days, with interest at 8 per cent., and as security for the payment of this note to cause a conveyance in trust to be made to Sylvester of certain real estate he owned in Chicago. Thereupon the plaintiff executed such a note and caused one Baldwin, who held the title of the real estate by trust conveyance from Kerting and wife, to convey to Sylvester said real estate. This conveyance was absolute on its face, but was in fact made as mere security, and both instruments were executed November 18th, 1879. As further collateral security for the payment of the $1,500 note the plaintiff deposited with Baldwin certain demands he held against third parties, the proceeds of which, when collected, were to be applied on the note.

At the time the note was given the following was written at
42 the foot of it: "This note is given as collateral security for chattel mortgage of American Oleograph Co., dated Sept. 17th, 1879;" and on the back of the note there was this endorsement: "Left as collateral hereto certain claims in the hands of A. B. Baldwin; also conveyance of real estate of even date herewith."

Cotemporaneously with the execution of this note and the Baldwin conveyance Sylvester, trustee, executed, by the hand of the defendant Cotzhausen the following instrument:

"CHICAGO, *November 18th*, 1879.

"Whereas the undersigned is the owner of a certain chattel mortgage bearing date September 17th, 1879, given by the American Oleograph Co.; and whereas, for the purpose of reducing the amount of said indebtedness, there was given under date hereof to the under-

signed a promissory note, executed by Frank Kerting, for fifteen hundred (1,500) dollars, payable thirty (30) days after date; and whereas said Frank Kerting has caused to be executed and delivered to the undersigned a deed of lot No. 45, in block No. 7, of Cushman's Subdivision of block No. 4 of Sheffield's Addition to the city of Chicago, county of Cook, State of Illinois, subject to a certain incumbrance of fifteen hundred ($1,500) dollars now existing thereon, with power of sale absolutely and unconditionally to dispose of said premises in case of default with either of the terms of the said note or chattel mortgage: Now these presents witness that the undersigned has agreed not to make use of such power of sale and disposal unless 30 days' previous notice be given to said Frank Kerting in writing; also that he will faithfully and truly account to said F. Kerting for the proceeds of any sale that may be made, and that the costs of executing this trust will not in any event exceed fifty (50)
43 dollars and legal expenses, if any such there shall be incurred.

The possession of the premises on the part of Kerting and wife shall not be interfered with unless default be made, nor shall they be required to pay any rent therefor. If, however, said premises should not be protected by said Frank Kerting against foreclosure of mortgage thereon existing or other encumbrance hereafter accruing, by way of taxes or otherwise, the right to sell and dispose of said real estate shall become immediately vested, and the proceeds may be then applied to the payment or reduction of the aforesaid note or chattel mortgage, or both, in so far as justly applicable thereto.

"Upon satisfaction of said chattel-mortgage debt the undersigned agrees immediately to reconvey the premises to the order of Frank Kerting, with warranty against his own acts; also to assign to him at any time, upon demand and proper payment therefor, the chattel mortgage or other securities now held against the Am. Oleograph Company.

"GEORGE SYLVESTER, *Trustee*,
"By F. W. COTZHAUSEN."

These transactions having taken place, the custodian in possession of the mortgaged property was withdrawn, the foreclosure of the Sylvester mortgage was suspended, and the Chicago Lithographing Company took charge of the business and property, the plaintiff Kerting exercising control as president of the company. The prosecution of the business was proceeded with, the note for $1,500 was paid in two installments of date December 23, 1879, and January 29th, 1880, and the amount of such payment was endorsed on the original note of the oleograph company.

On the 28th of February, 1880, the defendant, F. W. Cotz-
hausen, the oleograph company, by Munson, its president,
44 and the Chicago Lithographing Company, by the plaintiff, its president, had an accounting together and, by written agreement, stipulated that there was due on the mortgage to the Cleveland Paper Company, which had been assigned to Cotzhausen, the sum of $6,195.26 and interest to date; and it was agreed by the defendant that if by the first day of May, 1881, the aggregate

amount of said liens and indebtedness should be reduced by payments to $10,000 and the value of the securities should not be depreciated or jeopardized by non-payment of insurance or other act of the parties in possession or those in privy with them he would then fund in appropriate form, by way of chattel mortgage, the remaining capital of ten thousand dollars at the same rate of interest, payable monthly, for not less than one year from date thereof, if request in that behalf should be made on or before April 15th, 1880. This instrument of accounting and agreement was duly executed by Mr. Cotzhausen in behalf of himself, by Mr. Sylvester as trustee, by the American Oleograph Company, and by the Chicago Lithographing Company.

The business continued under the management of Kerting—payments of $1,421.11 and $1,180.40 being made on the Sylvester mortgage, of dates, respectively, June 15th and August 12th, 1880—until the early part of September, when the defendant, deeming himself insecure and his mortgage being due, again took possession of the mortgaged property and foreclosed both mortgages by summary proceedings, which were authorized by law.

It appears from the records in evidence that there was then due on the two mortgages the sum of $10,924.58; that there was realized on the sale of the mortgaged property the sum of $6,000, and that after applying the proceeds of the sale, first, to the payment of the expenses of sale; secondly, to the extinguishment of the first-mortgage
45 debt, and, thirdly, as far as the balance would go upon the the second-mortgage debt there remained a balance unpaid on the Sylvester mortgage of $5,147.58, which, as before stated, is the amount of the defendant's present claim, with accruing interest, against the plaintiff.

It has seemed necessary thus to summarize the foregoing facts, which, in most part, have been extracted from the documentary evidence in the case, in order to determine whether those facts, independent of the oral testimony of the parties, warrant the conclusion that the plaintiff personally assumed and promised to pay the Sylvester mortgage, so as to make him liable for the payment of the deficiency arising on the foreclosure sale. Clearly they do not. Such writings as we have in evidence neither contain nor establish such an agreement. The agreement then, if made, was verbal, and, this being so, the court is compelled to consider and weigh the oral testimony of the parties and, in connection therewith, the circumstances of the transaction.

It is not entirely clear under some of the later authorities on the subject that such a verbal promise as the defendant alleges the plaintiff made would not have been, even if admitted to have been made, within the statute of frauds. However that may be, after carefully considering the evidence in support of and against the defendant's contention, I am unable to find the alleged agreement proven by such a preponderance of the testimony as is essential to entitle the defendant to recover. The case, in this regard, must be considered as if it were one brought by the defendant independently of any suit brought by the plaintiff, and to entitle the defendant to

a judgment it ought to be made manifest by the weight of the evidence, especially as a verbal promise is relied on as the basis
46 of a large pecuniary liability, that within the understanding of both the parties at the time the plaintiff assumed as his personal obligation and agreed to pay the mortgage debt. Without impugning the sincerity of the statements made by either party upon the question of alleged liability, the duty is devolved upon the court to consider the whole evidence bearing on the issue, and so far as that evidence embraces oral testimony we find that it consists of direct affirmation on one hand and direct denial on the other.

The defendant did not sell the mortgaged property to the plaintiff. That is plain. It is true that in the bill filed by the plaintiff Kerting in the Chicago suit against Mr. Cotzhausen and others, the record of which is in evidence, the plaintiff alleged that he purchased the property from the defendant; but this was there denied by the defendant, and the allegation of such sale was probably made under mistake. The oleograph company was the owner of the property and Mr. Cotzhausen was in effect a mortgagee; so that in a transfer of the property the title had to pass from the former. As we have seen from one of the exhibits in evidence, the Chicago Lithographing Company was the purchaser and acquired the title from the oleograph company, the mortgage continuing to be a lien thereon. The lithographing company was recognized by the defendant as such purchaser and as in possession, for they both joined in the execution of the agreement of accounting of February 28th, 1880, to which also the trustee, Sylvester, and the oleograph company were parties. The lithographing company and not Kerting
47 individually purchased the property. The oleograph company was the original mortgage debtor and continued such to the end. The $1,500 note and the Baldwin trust deed were given for the purpose of reducing the indebtedness for which the property was liable and as security collateral to the chattel mortgage. To that extent, of course, Kerting bound himself personally, but that obligation is evidenced by writings duly executed. Upon satisfaction of the chattel-mortgage debt the Chicago real estate was to be reconveyed to Kerting and the mortgage was to be assigned to him as the obligation of the oleograph company. Nothing more can be inferred from the written instruments and agreements in evidence than that Kerting became personally bound to pay $1,500 of the debt in order speedily to secure a reduction of the indebtedness to that extent, and personally furnished certain collateral security. It seems clear from the whole testimony that with the debt reduced it was expected by the parties that the business under good management would pay the debts. That was evidently the view of all the parties; and, when all other contingencies were so fully provided for by stipulations, in writing, it is not, I think, putting it too strongly to say that it is quite remarkable that the alleged personal undertaking of the plaintiff to pay the entire debt was not also expressed in some one of the written agreements then made. In this connection it has occurred to the court that, even if

there were conversations between the parties during their negotiations upon which a promise by the plaintiff to pay the mortgage debt might have been predicated, it is difficult to see why, ap-
48 plying to the transaction a familiar principle of law, such promise should not be regarded as merged in the written instruments and agreements made at the time, and is not enforceable because it was merely part of such oral negotiations and because it must be presumed that the writings then made expressed whatever obligation either party ultimately intended to incur.

As I have said, it was supposed at the time that the business could be made profitable, and that with economical management the property was even more than adequate security for the debts. Mr. Cotzhausen so testifies. Mr. Kerting's view of the situation was the same as is shown by the testimony. Payments had been made by the oleograph company in weekly installments, and I have little doubt the mutual expectation that a reorganization of the company and a continuance of the business under new auspices would clear the way for the payment of the debts has occasioned the present misunderstanding and disagreement of the parties on the question of personal liability.

It is very plain that there was no substitution of either the lithographing company or Kerting as the defendant's debtor in place of the oleograph company, for the latter company was recognized as a debtor, still liable, in the execution of the agreement of accounting of date February 28, 1880.

It is within the experience of us all that controversies often arise between parties, prosecuted on both sides in the utmost good faith, where the ultimate judgment of the court depends upon the state of the case with reference to the preponderance of the testimony
49 or the want of such preponderance on one side or the other. Here the burden of proof is on the defendant to establish the alleged promise. Unfortunately, if the promise was made as claimed, it was not put in written form. As I have said, the defendant testifies that the plaintiff made the promise, and thereby became his personal debtor. The plaintiff affirms as strongly that he did not, and that no other stipulations or agreements were made than such as were put in writing and offered in evidence, and for corroboration appeals to the record in the Chicago suit instituted by him, wherein the defendant Cotzhausen, in his answer to the bill, set out the agreements and conveyances in writing in evidence here, or some of them, relating to the successorship of the lithographing company and Kerting to the business previously carried by the oleograph company, and denied that any other or further agreement was made with the plaintiff than such as was so alleged in his answer. The scope or effect of that denial should, however, as the defendant contends, undoubtedly be considered in its relation to the particular issues in that case.

In order that the precise position of the parties with reference to the vital question in this case may be well understood, it is desirable to refer, perhaps in some detail, to their testimony as we have it in the record.

Mr. Cotzhausen testifies that in the negotiations occurring in November, 1879, the plaintiff said he had some means; that he could pay $1,500 in cash and could secure whatever balance might remain by mortgage or trust deed on his homestead, worth $5,000; that he knew all about the business; that it would be a good, paying business in his charge, and that he had influential friends who would help him as soon as he had organized the concern and was
50 in charge of it.

"I consented to abandon the other arrangement," says the defendant, "and give him an opportunity to assume charge of the concern, which was done. The old company was abandoned, virtually sold out to Mr. Kerting—that is, the American Oleograph Company sold out to Mr. Kerting. Title was transferred and I agreed to take my money from Mr. Kerting."

Further, the defendant says Kerting "begged to be given an opportunity to assume charge of the business. He agreed to assume the payment of the debt and to discharge the same even faster than the obligations then existing called for." "He said in substance that he would pay that debt a great deal sooner than I could get the money at the present time; that he would pay $1,500 in cash immediately on account; that he would give further security for the balance that might remain, and that I would be much safer in dealing with him than I could possibly be in continuing with the old company. Words to that effect were repeated time and time again, in a variety of ways." The defendant further says that Kerting agreed to pay the mortgage indebtedness even quicker than the terms of the original contract called for; that he turned out by way of further security the trust deed to Sylvester, and that the defendant agreed that at any time when the plaintiff paid enough to cover the amount which remained over he would on demand put him, Kerting, in his, Cotzhausen's, shoes as against the company and transfer titles. In another form witness says that Kerting asked to be given an opportunity to take charge of and assume the business; that this was done and the previous project was aban-
51 doned; that he, Kerting, agreed to go into the business and expressed his readiness and ability to continue it and make it prosper, and stated in a variety of ways that he would pay the defendant a great deal faster than the old company could do; that "he pledged payment on account and turned out this further security."

The plaintiff testifies that when he met the defendant, the latter asked him whether he would like to go into the business in question. "I said, 'Well, I don't know; I might if everything was satisfactory.' Well, he told me that some of the parties running the business had beaten him so much—White and Thurber stole so much money from him one way and another—he wanted somebody to go in with Munson and reorganize the thing—somebody that knew about the business and he could rely on. Munson was not himself well posted in the business; the others he would not have in the business any longer. I said I might, if everything was satisfactory. He had to take a second mortgage, and it was payable in $75 a week. He

showed me the back of that note. * * * 'Well,' says I, 'I don't like to go into this business without finding out everything is all straight about it.' 'Well,' he says, 'you know Mr. Munson, and he has reorganized the Chicago Lithographing Company, and as I understand you are well posted in the business, you ought to make a success.' I says, 'It ought not to be any trouble to make at least $75 a week out of it, if not more.' He said if I could not pay on account he would like to have some additional security. I said in a couple of weeks I could raise perhaps $1,500, and I had some accounts I could transfer to him at that time; and he says,
52 'Well, I want it now.' I said I could not give it just now. He says, 'You had better make it in the shape of a note;' and I said, 'Yes, that will be all right, and I could transfer this deed conditionally; you control this deed until the note is paid.' That was all satisfactory. I went over to Baldwin's."

The plaintiff then states what he claims the defendant said in relation to taking care of, or guaranteeing, the Cleveland Paper Co.'s mortgage, and the following examination then occurs:

Q. In the course of this conversation was anything said by you about assuming or paying the debt of the American Oleograph Company, beyond what you have testified to?

"A. There never was a word said, excepting he said—he showed me the back of the note—'As long as $75 a week is paid there can nothing be done.' I said, 'There ought to be no trouble about $75, or even more; the business is good if handled right.' He said, Yes, he knows it is bad management—stealing and one thing and another. I said we could get along all right and pay $75 a week.

"Q. Were you requested in this conversation by Mr. Cotzhausen individually to assume this debt of the American Oleograph Company?

"A. He never spoke a word about it; there never was said anything about individually in any shape, except he says, 'Now you and Munson reorganize that, and of course you will have to work hard;' one thing and another. 'I want you to be honest about it; I don't want any beating about it.' He had trouble enough;
53 he said he understood I was a reliable man; I hadn't much money; he wanted to help all he could.

"Q. What was said at the time this deed was executed as to the security which that deed was made to guarantee?

A. When Mr. Cotzhausen asked me how much money have I got to turn in or to reduce the indebtedness, whichever way he says, I say I can raise about $1,500 in a couple of weeks. 'Well,' says he, 'I want it now.' I says, 'I have not got it now.' Says he, 'We had better make a thirty-day note for the $1,500.' I say, 'Well, I could turn in some accounts on account and also give him on that note a conditional deed.' That was a distinct thing that was done; it was to be on that note." * * *

The plaintiff then proceeds, in answer to questions asked him, to state the history of his connection with the Chicago Lithographing Company and the conduct of the business subsequently, and also to

give his version of the negotiations and arrangements which resulted in his association with Munson as the successors of the oleograph company in the management of the business, and concerning most of the material facts there does not appear to be serious disagreement between the parties, except in relation to the alleged personal assumption by the plaintiff of the mortgage indebtedness.

On cross-examination the plaintiff was asked numerous questions in relation to his testimony in the Chicago suit, and admitted that in that testimony he stated, among other things, that in the negotiations of November, 1879, he dealt with the defendant on the basis of taking the business off the defendant's hands or buying it
54 from him, and that he could pay $75 a week under a privilege like that which the oleograph company had, as evidenced by the indorsement of the original note. He also admitted that he had previously testified that after the arrangement was consummated he continued and had charge of the business, and that he purchased goods for the business—sometimes in his own name and sometimes as the president of the lithographing company.

It is unnecessary further to refer to the testimony of the plaintiff in detail, since it is familiar to counsel. Suffice it to say that wherein it was sought to show by it admissions in disparagement of the plaintiff's credibility it is quite as consistent, in my judgment, with the theory that the plaintiff assumed charge and control of the property and business simply subject to the mortgage, and that the debt, in the expectation of the parties, was to be realized from the proceeds of the business as it is with the theory that the plaintiff personally assumed the liability and himself by personal obligations undertook the payment of the debt. In fact, as we have seen, Mr. Cotzhausen was not the owner of the property and the plaintiff did not subsequently become the owner in his own right. To charge the plaintiff with personal liability the court should be satisfied by the weight of the evidence that the defendant, either expressly or by clear implication, intentionally assumed as his own the debt in question. If the case discloses circumstances which tend to support the defendant's claim, it must be said that on the other hand we find other circumstances which equally tend to sustain the plaintiff's contention. The issue, it must be confessed, upon the oral
55 testimony of the parties is a close one, and the mind of the court has not been free from doubt; but, after very careful consideration, I am constrained to conclude that in the state of the proofs the defendant's case is not established.

Finding and judgment for plaintiff.

56 July 1, 1887.—This day came the defendant and filed his bond in the sum of five thousand dollars, with August Richter, Jr., and George Sylvester as sureties, conditioned that he shall prosecute a writ of error to effect and answer all costs and damages if he shall fail to make good his plea; which bond is approved by the district judge and is as follows:

Supersedeas Bond.

United States Circuit Court, Eastern District of Wisconsin.

FRANK KERTING, Plaintiff,
vs.
F. W. COTZHAUSEN, Defendant.

Know all men by these presents that we, F. W. Cotzhausen, August Richter, Jr., and George Sylvester, all of the county of Milwaukee and State of Wisconsin, in the eastern district of Wisconsin, are held and firmly bound unto said Frank Kerting in the sum of five thousand dollars ($5,000.00), to be paid to the said Frank Kerting, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 30th day of June, A. D. 1887.

Whereas lately, at a term of said court, in a suit pending
57 in the said circuit court for the eastern district of Wisconsin, between said Frank Kerting, plaintiff, and said F. W. Cotzhausen, defendant, judgment was rendered and docketed against said F. W. Cotzhausen for the sum of $2,299.05;

And whereas said F. W. Cotzhausen has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment aforesaid for the said sum of $2,299.05 in behalf of said F. W. Cotzhausen, plaintiff in error, and against said Frank Kerting, defendant in error:

Now, therefore, the condition of this obligation is such that if the above-named plaintiff in error, F. W. Cotzhausen, shall prosecute his said writ to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise it remains in full force and virtue.

F. W. COTZHAUSEN. [L. S.]
AUG. RICHTER, JR. [L. S.]
GEORGE SYLVESTER. [L. S.]

Signed, sealed, and delivered in presence of—
FRED. SCHEIBER.
JOHN THIEMANN. LL. D.

STATE OF WISCONSIN,
Eastern District of Wisconsin, County of Milwaukee, } ss:

August Richter, Jr. and George Sylvester, being each duly and severally sworn, depose and say and each for himself respectfully deposes and says that he is a resident and citizen of said
58 State, district, and county; that he executed the foregoing bond as one of the parties therein, and that he is worth the sum of three thousand dollars in property within said State, dis-

trict, and county not exempt from execution and over and above all his debts and liabilities and obligations.

AUG. RICHTER, JR.
GEORGE SYLVESTER.

Subscribed and sworn to before me this 30th day June, 1887.
[SEAL.] JOHN THIEMANN,
Notary Public, Mil. Co., Wis.

Endorsed: Approved. Chas. E. Dyer, judge.

Whereupon it is ordered that execution be superseded and a writ of error and citation issued, and a copy of said writ of error lodged for the defendant in error.

59 And afterwards, to wit, on the one hundred and eleventh day of said January term, to wit, on the 7th day of July, A. D. 1887, the following proceedings were had, to wit:

Submission of Bill of Exceptions & Order Thereon.

FRANK KERTING
vs.
F. W. COTZHAUSEN. } At Law.

This day came the parties, by their counsel, and the defendant submitted a bill of exceptions, and, it appearing that the plaintiff should have the right to examine the same and submit amendments thereto if he shall be so advised, it is ordered by the court that said bill of exceptions be served upon plaintiff's counsel, and that he be allowed twenty days after such service to submit amendments.

August 17, 1887.—This day came the parties, by their counsel, and upon application of the plaintiff it is ordered by the court that he be, and hereby is, allowed twenty days from the 23d day of August instant to submit amendments to the defendant's bill of exceptions.

October 12. 1887.—Bill of exceptions signed and filed as follows:

60 Circuit Court of the United States, Eastern District of Wisconsin.

FRANK KERTING
vs.
F. W. COTZHAUSEN.

Bill of Exceptions.

Be it remembered that this cause was submitted to the court by stipulation in writing, without the intervention of a jury, and came on to be tried before his honor Charles E. Dyer, district judge, on the 15th day of February, 1887.

The plaintiff—the cause being called for trial—in support of the

issue on his part, put in evidence the record of the judgment referred to and described in the complaint, duly authenticated, in favor of the plaintiff and against the defendant, and then rested.

In support of his first counter-claim set up in the answer the defendant offered in evidence a certain note and chattel mortgage, bearing date September 17th, 1879, executed by the American Oleograph Company to George Sylvester, trustee, for $7,897.67, with interest at 8% from date until paid. The note contains a warrant of attorney to confess judgment at any time, in term time or vacation, and is endorsed as follows: "As long as $75 per week is paid on this note no action shall be taken thereon."

The chattel mortgage covers the whole stock—machinery, tools, implements, goods, wares, and merchandise—several thousand in number, used and employed by the mortgagor in carrying on a lithographing and engraving business at the city of Chicago. It contains, among others, the usual clauses authorizing the mortgagee to take possession when feeling insecure and unsafe or fearing diminution, removal, or waste for want of proper care of the property.

61 Whereupon the defendant was sworn in his own behalf and testified:

Mr. Sylvester, the trustee named in the mortgage, acted in behalf of myself and the First National Bank of Milwaukee at the time it was given. I made the acquaintance of the defendant November, 1879, when I went down to Chicago to foreclose this chattel mortgage. I had heard of him more or less before that time, but had never met him until November, 1879, when Kerting assumed this debt. There was a prior chattel mortgage on the same property, which is now offered in evidence. The same was given, under date of July 17th, 1879, by the American Oleograph Company to the Cleveland Paper Company to secure two notes, payable one year from date, with interest at 8% per annum, for $5,000 each. When the second mortgage was executed I understood that there was but $6,890 actually owing on the first mortgage, and I had given notice to the first mortgagee when I became interested in the second mortgage that I would not recognize any prior claim in excess of the amount actually due and owing when the second mortgage was given. In November, 1879, the company had become bankrupt. Alexander White, its principal stockholder, had become a defaulter to his family, as he claimed, upwards of $100,000. He was indebted to me for three-fourths of the purchase-money of the company, for which I held the endorsed notes of himself and the American Oleograph Company—upwards of $20,000—all of which went to protest. He had left Chicago, and the very back-bone of the company was gone. The president, Mr. Kurtz, who was the only artistic element in the concern, had resigned, and Messrs. Munson and Thurber were the only officers left, the former acting as treasurer and bookkeeper and the latter as secretary. There was a great deal of correspondence between Munson and myself as to a reorganization of the company.

62 I advised Munson that he should get other responsible business elements into the concern, as it could not thus prosper, and I addressed him to several parties in Chicago of whom I knew that they were desirous to enter such a business—amongst others, to one Mr. Flotow. I also told Munson that if they failed in reorganizing the company on a new basis and to get capital into it they should give me an opportunity to do so before its reputation had entirely become lost, because it was evident that while the business was still going on and expenses of the concern kept down the mortgage securities were more than adequate security for the first and second chattel mortgages, but as soon as the business came to a standstill the machinery and stones, comprising the bulk of the mortgaged chattels, would not likely pay one-half or two-thirds of the debt. I state this to be a fact. Lithograph machinery and stones have no market value, and a great element of value consists in the drawings and the work on the stones, which is utilized in engraving.

In November, 1879, Munson had failed in effecting a reorganization of the company and so informed me. Flotow and Piratzkey (a friend of his) were ready to join me in the reorganization of the company, but not Mr. Munson, whose reputation did not seem to be of sufficient standing at the time. I was thus informed, and I corresponded with Mr. Flotow, and it was agreed that I should make an arrangement with the American Oleograph Company and Munson to get title and possession of the whole of the property and business, with its good will, in running order, and when that was done Flotow and Piratzkey would join me in reorganizing the business on a $20,000 basis. They agreed to accept the property, with its outstandings and good will, at the time for $20,000. They were high-standing parties, experienced in the business, and men of a great
63 deal of character. The correspondence relating to these matters is within reach here in court.

About this time default was made in the payment of the $75 weekly installments. The American Oleograph Co. was bankrupt, and the parties had failed in effecting a reorganization. I then went to Chicago. I put a custodian in charge of the place, threatened to foreclose, and continued my negotiations with Flotow and Piratzkey on the spot. This was on the 17th and 18th of November, 1879. I concluded an arrangement with them at that time to the effect I have stated; Mr. Kurtz, the former president of the company, also became a party to it and agreed to join the new concern. The arrangement was to be consummated the next following day. I had offered Mr. Munson $1,000 to $1,200 for a quitclaim deed and possession, in order to save foreclosure, while agreeing to pay the first mortgage myself. The next following day Mr. Flotow, Piratzkey, and myself had agreed to meet at 11 o'clock to consummate the arrangement between ourselves in writing, by the payment of cash, and with Mr. Munson. When I returned to the lithographing establishment the preceding night at 4 o'clock I was asked by Mr. Munson for permission to introduce to me a man by the name of Kerting. He said Kerting was a very methodical man and had been connected with the American Oleograph Co. for some time.

He begged for him an introduction and an opportunity once more to try to reorganize and continue that business.

I yielded to his begging and allowed Kerting to be introduced that same night in the office of the company. He stated his former experience. I told him mine; that it had been very bad; that I had been defrauded at all corners; that I was cheated out of three-fourths of the purchase-money of the company by White and his associates, and that the second chattel mortgage was for a part of my
64 claim—forced at the end of a lawsuit—and was now in danger of being lost; that I had made this arrangement with Flotow now and — could not well be changed; but he and Munson begged and begged. Kerting said he had some means; he could pay $1,500 cash and secure whatever balance might remain by a mortgage or trust deed on his homestead, which was worth some $5,000. He knew all about the business; the fault had been in the management; it was a good, paying business, and would prove so in his own charge; that he had influential friends, who stood ready to help him as soon as he had organized that concern and was in charge of it, and words of that kind. I agreed to go with him to his own lawyer; consented to abandon the other arrangement and to give him an opportunity to assume charge of the concern, which was done.

The old company was abandoned, virtually sold out to Mr. Kerting—that is, the American Oleograph Company sold out to Kerting; title was transferred, and I agreed to take my money from Mr. Kerting.

DEFENDANT'S COUNSEL: At this stage of the proceedings I offer in evidence a bill of sale of the property mentioned from the American Oleograph Co. to the Chicago Lithograph Company in the words following, to wit:

Know all men by these presents that the American Oleograph Company, for and in consideration of the sum of two thousand dollars to it in hand paid by the Chicago Lithographing Company, party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and deliver unto the said Chicago Lithographing Company, its successors or assigns, the following-described goods and chattels, to wit:

One steam Potter press, two German presses (steam), ten hand presses, one paper-cutter, one ink mill, and all lithographing stones, stock, and material on hand and now in the possession of
65 said party of the first part and in the building number eighty-three, eighty-five, and eighty-seven Fifth avenue, Chicago, Illinois, subject, however, to two mortgages now resting upon a portion of said property, as particularly described therein, one of the said mortgages being to the Cleveland Paper Company and the other to George Sylvester, trustee:

To have and to hold the said goods and chattels unto the said Chicago Lithographing Company, its successors and assigns forever.

In witness whereof the said American Oleograph Company, by its

president and secretary, have this 19th day of November, A. D. 1879, set their hands and attached the seal of said company hereto.

S. B. MUNSON, JR., *President.* [SEAL.]
E. C. THURBER, *Secretary.* [SEAL.]

Also a warranty deed from Ida Kerting and Frank Kerting, her husband, to Algernon B. Baldwin, dated September 19th, 1879, of lot 45, block 7, Cushman's subdivision of block 4 of Sheffield's Addition to Chicago, the premises being subject to an incumbrance of $1,500.

Also a warranty deed, dated September 22, 1879, and acknowledged November 18, 1879, from Algernon B. Baldwin and wife to George Sylvester, trustee, of the same premises.

Also a certain other writing, containing defeasance and other clauses, which writing was offered, with the statement of counsel for defendant that the same recited the conditions upon which the deed was executed, and which is in the words following, to wit:

CHICAGO, *Nov. 18th*, 1879.

Whereas the undersigned is the owner of a certain chattel mortgage bearing date Sept. 17th, 1879, given by the American
66 Oleograph Company; and whereas, for the purpose of reducing the amount of said indebtedness, there was given, under date hereof, to the undersigned a promissory note executed by Frank Kerting for fifteen hundred dollars ($1,500), payable thirty (30) days after date; and whereas said Frank Kerting has caused to be executed and delivered to the undersigned a deed of lot number forty-five (45), in block number seven (7), of Cushman's subdivision of block number four (4) of Sheffield's Addition to the city of Chicago, county of Cook, State of Illinois, subject to a certain incumbrance of fifteen hundred dollars ($1,500) now existing thereon, with power of sale absolutely and unconditionally to dispose of said premises in case of default with either the terms of said note or chattel mortgage: Now, these presents witness that the undersigned has agreed not to make use of such power of sale and disposal unless thirty days' previous notice be given to said Frank Kerting in writing; also that he will faithfully and truly account to said Frank Kerting for the proceeds of any sale that may be made, and that the costs of executing this trust will not, in any event, exceed fifty dollars ($50) and legal expenses, if any such there should be incurred.

The possession of the premises on the part of Frank Kerting and wife shall not be interfered with unless default be made, nor shall they be required to pay any rent therefor.

If, however, said premises should not be protected by said Frank Kerting against foreclosure of mortgage thereon existing or other encumbrances hereafter acquired by way of taxes or otherwise, the right to sell and dispose of said real estate shall become immediately vested and the proceeds may then be applied to the payment or reduction of the aforesaid note or chattel mortgage, or both, in so far as justly applicable thereto.

Upon satisfaction of said chattel mortgage the undersigned agrees

immediately to reconvey the premises to the order of Frank
67 Kerting, with warranty against his own acts; also to assign to him at any time, upon demand and proper payment therefor, the chattel mortgage or other securities now held against the American Oleograph Company.

GEORGE SYLVESTER, *Trustee*,
By F. W. COTZHAUSEN.

Whereupon witness continued: I had several conversations with Mr. Kerting. I talked to him generally about a reorganization on part of Kerting and friends. It was all by way of general allusion to what had preceded the matter in the way of correspondence. I had nothing to do with the reorganization of the company, and the bill of sale to the Chicago Lithographing Company, which has been introduced, I did not see or hear of until about a year later and when it made its appearance in court. The first general allusion to the policy of reorganizing the business was made at the first interview, when I made the acquiantance of Kerting. He then begged to be given an opportunity to assume charge of that business. He agreed to assume the payment of the debt and to discharge the same even faster, as he expressed himself, than the obligation which then existed called for. He said, in substance, that he would pay that debt a great deal sooner than I could get the money at the present time; that he would pay $1,500 in cash immediately on account; that he would give further security for the balance that might remain, and that I would be much safer in dealing with him than I could possibly be in continuing with the old company. Words to that effect were repeated and repeated time and time again in a variety of ways. I told Kerting I would accept this proposition. I decided to give him an opportunity to become substituted for the American Oleograph Company. The original debtor should become disbanded, except nominally.

68 When the promise to pay $1,500 in cash came to be reduced to writing and to be carried out the next day, he modified it somewhat, but payments were made by him in the course of time to the extent of $1,500. We went to Baldwin's office, who was Mr. Kerting's attorney, the next following day to consummate the transaction by the payment of cash and the execution of papers relating to further and additional security. Mr. Kerting gave a note for the $1,500, which was fully paid in installments by the 23rd day of December, 1879; this note was secured, or intended to be, by the trust deed to George Sylvester and a number of outstanding collections, which were placed in the hands of Mr. Baldwin to be applied on the note as soon as realized. Kerting had agreed to pay this $1,500 in cash, but when the matter came to be consummated the next day he didn't have the cash, but he said he had outstanding accounts which would be paid on presentation. I refused to meddle with them, and so he made the note and placed those accounts in the hands of Baldwin for collection, who agreed to turn the money over to me on account of the $1,500, less his collection fee and some $75 costs of foreclosure. Kerting caused the deed to

be executed from Baldwin to Sylvester, trustee, and I signed for Sylvester the defeasance, which has been introduced, stating the terms upon which the deed, absolute upon its face, was received. That was by way of further security, as the gentleman was a stranger to me at the time. When this security was given Mr. Kerting agreed to pay the indebtedness then due to me even quicker than the terms of the original contract called for, and he turned out this trust deed to Mr. Sylvester by way of further security to what he promised, and he made me agree that at any time when he had paid enough to cover the amount which remained over that I would, upon demand on his part, put him in my shoes as against the company and transfer title. The agreement of Mr. Kerting to pay this debt
69 ran throughout all conversations. You cannot separate them. Mr. Kerting asked me to give him an opportunity to take charge of and assume that business. I did so and abandoned my previous project; that was settled. The gentleman agreed that he would go in there, expressed a readiness and ability to continue that business and to make it prosper, and he stated in a variety of ways, time and time again, that he would pay me a good deal faster than the old company possibly could have done or the old papers called for, and he pledged payments on account and turned out this further security on his home. This was stated in a variety of ways, but it is all the same thing. The deed that was executed at the time is part of that agreement.

As I stated, Mr. Baldwin was the attorney for Kerting, except in so far as he receipted to me for the accounts which Kerting put in his hands in reduction of the $1,500 note. The deed from Baldwin to Sylvester was acknowledged on the 18th day of November, 1879, and delivered on the 19th of the same month.

The following letter, written by me to Mr. Baldwin immediately on my return home, explains the situation. Said letter is as follows:

MILWAUKEE, *Nov.* 19*th*, 1879.

Algernon B. Baldwin, Esq., Chicago.

DEAR SIR: I returned at midnight. Before leaving I ascertained from Mr. Sam. Gehr, 114 Dearborn St., that Kerting had not paid his taxes for 4 years; that he (Gehr) had caused them to be bought in—at least that they were in the hands of a friend, where the taxes could be controlled; that for the 1st year a tax deed had already issued, but could be had at an advance of about $50; that the aggregate of all taxes, etc., would amount to $225, $250, etc. Now you may imagine that I pitched into Kerting before my de-
70 parture. Again I meet the parties in the best of spirit and with the best of intentions, but find myself disappointed and annoyed by these misstatements and neglects, so I can find no words for it.

Now I desire to say to you: Go at once to Sam. Gehr, redeem the taxes, and procure quitclaim to Geo. Sylvester; if necessary to pay a bonus, do so, if not exorbitant, and draw on our firm for the necessary am't above funds by you collected from outstandings. I

wish you to do so as my attorney, sending me bill, etc., for professional attendance.

Secondly. Make Kerting understand that I tolerate no loose business habits; whatever is promised and settled on must be carried out at all risks; but that, if adequately secured and honestly dealt with, I prefer to leave my capital at 8% rather than foreclose and draw it out; so that he can take his own gait in fixing up things, after carrying out *verbatim* his agreement with me. This involves:

1. Delivery of Raap's note to you.
2. Cancellation of outstanding tax interests.
3. Delivery of work to Fairbanks, Steele & Price and others, so as to make good the accounts assigned.

By the way, Cobb & Bingham called at oleog. comp. last night to pay their bill. Had you not better collect from them at once and give notice of assignment to others?

As a matter of course, I shall be holden for all services rendered in my matters outside of collection, while on the other hand I expect that no exertions will be spared to have Kerting arrange his matters with me in all particulars.

The Cleveland Paper Comp. mortgage (you may inform Kerting) I shall take care of, up to am't actually due on date of my 2nd mortgage. The amount beyond that is trifling, about $1,200, and ought it not to be impossible for Munson and friends to ar-
71 range the difference with Mr. Taylor.

I am leaving for West Bend this afternoon to try some equity cases; shall go to St. Louis again on Sunday. I may, if necessary stop at Chicago.

Yours truly, COTZHAUSEN.

The defendant also offers in evidence a deed of Ida Kerting in her own right and Frank Kerting, her husband, to Sam. Gehr of the same premises mentioned in the other deed, dated December 8th, 1876, being a deed of trust to secure the payment of $1,500 three years after date with interest at eight per cent.

Whereupon the witness continued:

After the execution of the papers mentioned before the custodian was withdrawn and the foreclosure was abandoned, the property was turned over to the possession of Kerting and friends at the time, and I left for home. I understand that it was afterwards turned over to a concern by the name of the Chicago Lithographing Company; but of the company I have no knowledge beyond what this bill of sale shows, of which I learned subsequently. I had nothing to do with it.

There was no payment made on the second chattel mortgage. The next following February I had to buy and assume the first chattel mortgage, which was in process of foreclosure—notices posted. Then there was an agreement made that if the amount of the first and second chattel mortgages by May first were reduced to $10,000—the two together—that then Mr. Kerting and the company by him represented should be entitled to renew the mortgage lien

for a number of years longer at eight per cent. The agreement was in writing and is as follows:

72 CHICAGO, *February* 28, 1880.

Know all men by these presents that upon an accounting and adjustment this day had between the Chicago Lithographing Company, the American Oleograph Company, F. W. Cotzhausen, and George Sylvester, trustee, there is found to be due and owing, under date hereof, on the various chattel morgages and securities now held by said F. W. Cotzhausen and George Sylvester, trustee, the sums and amounts below stated:

First. On chattel mortgage dated July 17, 1879, given by American Oleograph Company to Cleveland Paper Company, recorded on July 24th, 1879, at 3 o'clock p. m., in Book 888, on page 327, and assigned to said F. W. Cotzhausen on the 28th day of February, A. D. 1880, the sum of sixty-eight hundred dollars, with interest, at the rate of eight per cent. per annum, from February 23rd, 1880.

Second. On chattel mortgage dated September 17, 1879, given by American Oleograph Company to George Sylvester, trustee, recorded on September 18, 1879, at eleven o'clock a. m., in Book 901, on page 150, the sum of sixty-one hundred and ninety-five dollars and twenty-six cents, for principal and interest up to date hereof.

And said F. W. Cotzhausen also hereby certifies that if by the first of May next the aggregate amount of said liens and indebtedness is reduced by payments to ten thousand dollars, and the value of said securities not depreciated or jeopardized by non-payment of rent, insurance, or other act of the parties in possession or those in privy with them, he will then fund in appropriate form, by way of chattel mortgage containing the usual conditions and covenants, the remaining capital of ten thousand dollars, at the same rate of interest, payable monthly, for not less than one year from date thereof, if request in that behalf be made on or before April 15th, 1880.

73 In witness whereof said parties have hereunto set their hands and seals the day and year above written.

F. W. COTZHAUSEN, *Martgagee.*
GEO. SYLVESTER, *Trustee,*
Per F. W. COTZHAUSEN.
AMERICAN OLEOGRAPH CO.,
By S. E. MUNSON, JR.,
Pres., Mortgagor.
CHICAGO LITHOGRAPH CO.,
F. KERTING,
Pres., Purchaser in Possession.

In presence of—
A. B. BALDWIN.

No further payments, however, were made between February and May. On June 15, 1880, there was paid $1,421.11 on account, and on August 12, 1880, $1,180,40; nothing beyond this since February, 1880. When the first chattel mortgage run out, it escaped my atten-

tion for some time that it was overdue. When, towards the latter part of August or the beginning of September, it was brought to my mind that the first chattel mortgage had run out, I caused the mortgages to be foreclosed. The interest of the First National Bank in the second mortgage had, prior to this time, become extinguished.

After the foreclosure a great deal of litigation ensued between Mr. Kerting and myself relating to the property. I didn't get out of court for some four or five years.

Kerting filed a bill against me on the equity side of the court on the ground that I had led him into the belief that he was buying a valuable property; that the business was not subject to any debts outside the chattel mortgages; that there was a great deal less due on the first chattel mortgage than afterwards turned out to be the fact; that I had sold him the various goods and chattels
74 referred to in the chattel mortgages; that he stood to me in the relation of a vendee of that property, acting upon the theory that I had foreclosed the mortgage and had become the absolute owner of the property; had been guilty of false and fraudulent representations on the said sale, and seeking to hold me liable, first, on the ground of fraud, and, secondly, on the ground that I guaranteed to protect him against the first chattel mortgage in all emergencies, and did not keep that promise, and therefore had no right to foreclose that mortgage, and that the chattel, mortgage sale was void.

I defended by first putting in an answer setting up the facts as they actually occurred, and also filed a cross-bill in that suit, and asked that the Sam. Gehr mortgage, which I bought, be foreclosed. Secondly, we asked the court, by way of the cross-bill, for the foreclosure of the 2nd trust deed—the trust deed to George Sylvester.

At first I did not know what position Kerting occupied in regard to the Chicago Lithographing Company. By February, 1880, I learned that he was acting as president and manager of such concern.

Defendant now offers in evidence the record in a certain suit in chancery in the superior court of Cook county, brought by Frank Kerting *vs.* Frederick W. Cotzhausen, George Sylvester, Samuel Gehr, *et al.*, and cross-bill therein filed by F. W. Cotzhausen against Frank Kerting, Ida Kerting, *et al.*, from which the following is made to appear, and contains all that is essential in the consideration of this cause:

75 *Bill of Complaint.*

The bill of complaint sets forth the execution of the chattel mortgage by the American Oleograph Company to the Cleveland Paper Company and the second chattel mortgage by the same party to George Sylvester, trustee, and then alleges that on the 17th day of November, 1879, default having been made in the terms of the second chattel mortgage, "Cotzhausen took possession of and foreclosed the property described therein, which was all the property of the

said company, and that Cotzhausen, then and there claiming to be so in possession of said property and to be the owner thereof, offered to sell to your orator all of the said property, representing that the same wes free from all incumbrances of any kind whatsoever, except a mortgage to the Cleveland Paper Company, and that the American Oleograph Company owed in small debts, not to exceed $200.00; that there was actually due upon the first mortgage only $6,800.00, and that, relying upon the said statements and representations of said Cotzhausen, your orator bought the said property of said Cotzhausen; that the purchase price at which said Cotzhausen sold said property and the same was bought by your orator was the amount actually due upon the mortgage to the Cleveland Paper Company and the amount actually due upon the note to Sylvester, trustee, and the accrued interest upon the same; that it was then and there agreed by and between said Cotzhausen and your orator that your orator was to pay said Cotzhausen upon said purchase price the sum of $75.00 in each and every week until the whole amount due to the said Cleveland Paper Company and upon the note to said George Sylvester, trustee, was fully paid; and said Cotzhausen then and there agreed with your orator that he would protect him against the said mortgage to the Cleveland Paper Company and save him and the property bought by him, your orator, harmless there-
76 from, and that in consideration of said representations, undertakings, and agreements on the part of said Cotzhausen with your orator your orator executed the promissory note for $1,500.00 and caused to be executed a deed from Baldwin to George Sylvester, trustee," to which particular reference has been made in the preceding portions of this bill of exceptions.

The bill thereupon continues to state that "after the making of said agreement and the delivery of said note and deed the said Cotzhausen delivered to your orator and he, your orator, then and there accepted possession of said property and carried on the said lithographing business until he was deprived of the possession of said property as hereinafter mentioned" (referring to the foreclosure sale, to which allusion has been made in the bill of exceptions). The bill thereupon further charges that the various representations by which Kerting was induced to purchase said property turned out to be false and untrue, and the complainant prays for an accounting and damages, and, among other things, that the said George Sylvester, trustee, be ordered and decreed to reconvey to your orator and to release the trust deed referred to aforesaid.

Answer.

The defendant, by answer, takes issue upon the allegations of the bill and alleges, amongst other things, that, "acting under the power and authority conferred by said second mortgage, he took possession of the property described in the mortgage for the purpose of foreclosing the same; that the property therein described consisted for the greater part of printing presses and lithographing stones; that in its very nature such properties are very uncertain and of ques-

tionable value; that while its cost price exceeded $20,000.00 the property in question, unless offered and sold in connection with an
77 established business and paying custom, were not worth and would never have sold for one-half of that amount.

That for these reasons this defendant was extremely anxious to avoid a legal foreclosure and consequent disturbance of the business and inclined to sacrifice a thousand dollars, more or less, in addition to the amount of the various incumbrances, and with that view opened negotiations with S. B. Munson, Jr., then acting as the president of the company, for a quitclaim and peaceable possession of the mortgaged property and other assets and appurtenances to said business belonging.

That while such negotiations were still pending this defendant was introduced to the complainant, who was until then an utter stranger to him, and who then and there informed this defendant that he and Munson proposed to reorganize said business under and by virtue of a new charter and company, named the Chicago Lithographing Company; that he was fully familiar and had been connected with the concern for some months; that its adversities and lack of success had been owing to bad management and unfamiliarity on the part of S. B. Munson, Jr., with the lithograph business; that he had three to four thousand dollars of capital which he was willing to invest, and that as soon as the company was reorganized and free from the floating debt of the American Oleograph Company influential friends would be ready to assist and take stock; and said complainant then and there joined with said Munson in the request that they be given another opportunity to work out, and offered to give further and additional security to this defendant's second mortgage by a trust deed of his home and lot, and agreed to pay in cash within one week the sum of fifteen hundred (1,500) dollars on account, besides the costs; that this defendant was finally prevailed upon to accede to his request, and, proceeding with him to the office of Algernon B. Baldwin, his, the complainant's, attorney, he caused then and there, under date of November 18th, 1879, the various papers to
78 be executed and delivered to which allusion has been made in the foregoing bill of exceptions referring to the note, assignment of accounts, trust deed to Sylvester, and conditions of defeasance; and thereupon the defendant continues as follows: "And this defendant, further answering, denies that in November, 1879, he foreclosed said mortgaged property or that he claimed to be the owner thereof, and denies that on or about the 18th day of November, 1879, or at any other time he sold property to the complainant, and denies each and every allegation of said amended bill in relation to the alleged sale of said property by this defendant to complainant, and denies that at any time he made any other or different or further agreement with said complainant than has already been set forth in this answer."

The defendant Cotzhausen in the same suit also filed his cross-bill, praying that the first trust deed given by Frank Kerting and wife to Samuel Gehr, to which he claimed title by purchase and assignment, be foreclosed; and, furthermore, that he have a decree

of foreclosure on the second trust deed given to George Sylvester in trust for C., for the balance which remained due and unpaid on foreclosure of second chattel mortgage.

79 On the 7th day of January, 1884, the court filed its decree upon the original and cross-bill, whereby it found that the American Oleograph Company executed the two certain chattel mortgages to which allusion has been made in the foregoing testimony; that default was made in the payment of the weekly installments on the second mortgage, and Cotzhausen, who had then become the sole owner of the same, threatened to forelose the said mortgage; that on the 8th day of December, 1876, Ida Kerting, then owner in fee of lot 45, block 7, Cushman's subdivision of block 4 of Sheffield's Addition to Chicago, together with her husband, executed a trust deed to Samuel Gehr to secure a note of $1,500.00; that in January, 1880, Cotzhausen purchased and became the equitable owner of said last-mentioned note and security, the same being assigned to George Sylvester in trust for C.; that on the 19th day of September, 1879, Ida Kerting, her husband joining with her in the deed, conveyed the same premises, subject to the aforesaid incumbrance, to A. B. Baldwin by a deed, absolute on its face, but really in trust, to be conveyed by said Baldwin to said Frank Kerting, to be used by him as a means of credit.

The court further finds that on November 18, 1879, said Frank Kerting became interested in the business previously carried on by the said American Oleograph Company, and to prevent a foreclosure of said second chattel-mortgage gave Cotzhausen additional security for the indebtedness thereby secured, executing the note for $1,500.00 and causing said Baldwin by deed to convey said lot to George Sylvester, trustee, to secure said $1,500.00 note and second chattel-mortgage debt, but that both said Sylvester and said Cotzhausen had notice of the trust under which said Baldwin held said title. The court also finds that after and in November, 1879, the American Oleograph Company duly transferred the equity of redemption in said mortgaged property to the Chicago Litho-

80 graphing Co., and that said business was thereafter carried on in the name of said last-mentioned company, said Frank Kerting acting as president and manager thereof.

The court also finds that, default being made, said two chattel mortgages were duly foreclosed and the mortgaged property on the 25th day of September, 1880, duly sold to Cotzhausen for the sum of $6,000.00, and that there remained a balance due on said sale, on the second chattel-mortgage indebtedness, under date of September 25th, 1880, of $5,147.58.

The court further finds that all the allegations of the amended bill inconsistent with the facts as found in the decree are untrue, and that the equities of the case upon the amended bill are with the defendant, and ordered the amended bill to be dismissed for want of equity at the costs of the complainant. On the cross-bill the court entered a decree of foreclosure on the first trust deed to Samuel Gehr, but denied foreclosure on the second trust deed to George Sylvester because said premises had been conveyed by Baldwin in violation

of the terms of his trust, of which both Sylvester and Cotzhausen had full notice.

The remaining portions of said pleadings and decree are not believed to be essential in the consideration of this case.

Whereupon def't rested.

81 In defense to said counter-claim, the plaintiff KERTING offered himself as a witness and, being duly sworn, testified:

I remember the first interviews between Mr. Cotzhausen, Mr. Munson, and myself in November, 1879, relative to the transactions that have been referred to on the part of Mr. Cotzhausen in his testimony. I had an office down-stairs in the same building where the American Oleograph Co. was. I knew Mr. Munson, and he came down one morning and wanted me to go up and see Mr. Cotzhausen, telling me he had had some conversation with Mr. Cotzhausen about having me go in with him in the business. I was then carrying on business for myself down-stairs—lithographing business. I never saw Mr. Cotzhausen before. He asked me whether I would like to go into this business—have a hand in this business. I said, Well, I didn't know; I might if everything was satisfactory. Well, he told me that some of the parties running the business had beaten him so much—White and Thurber stole so much money from him one way and another—he wanted some one to go in with Mr. Munson and reorganize the thing—somebody that knew about the business and he could rely on. Munson was not himself well posted in the business and the others he would not have in the business any longer. I said I might if everything was satisfactory. He stated that he had to take a second mortgage, to be paid in installments of $75 a week. He showed me the back of that note (that is the note); I just saw the back. "Well," says I, "I don't like to go into this business without finding out everything is all straight about it. "Well," says he, "you know Mr. Munson; he has reorganized the Chicago Lithographing Co., and as I understand you are well posted in the business, you ought to make it a success." I says, "It ought not to be any trouble to make at least $75 a week out of it, if not more." He said if I could not pay on account he would like to have some additional security. I said in a couple of weeks, I could, perhaps,
82 raise $1,500, and I had some accounts I could transfer to him at that time; and he says, "Well, I want it now." I said I could not give it just now. He says, "You had better make it in the shape of a note, and I said, "Yes; that will be all right, and I could transfer this deed conditionally—you control this deed until the note is paid." That was all satisfactory. I asked him that question: "How is it about the Cleveland Paper Co.?" He says, "Well, I guarantee that mortgage; that they will never trouble you as long as you keep reducing this at the rate of $75 a week. It never shall trouble you, I guarantee." That was said in Mr. Baldwin's office and Mr. Baldwin heard that. Then Mr. Cotzhausen said Munson and me reorganize this company and make a new com-

pany. The oleograph sells out to the lithographing Co., and, of course, they reorganize—have it running under the Chicago Lithographing Co. They had a charter and officers, &c., and Mr. Munson was one of the officers of that company. The company had been reorganized, I think, two or three months previously. It was chartered under the laws of Illinois. The charter of said company was here shown witness and put in evidence and the witness said—referring to said charter—This is the company we were to reorganize and carry on the business under. The deed of trust and other papers were made at the same time. There never was a word said about my assuming or paying the debt of the American Oleograph Company beyond what I have testified to, excepting he said—he showed me the back of the note—"As long as $75 a week is paid, there can nothing be done." I said, "There ought to be no trouble about $75 a week or even more. The business is good if handled right." He says, "Yes; he knows it is bad management—stealing and one thing and another." I said, "We could get along all right and pay $75 a week." Mr. Cotzhausen never spoke a word about my individually assuming this debt. There never was said anything about individually in any shape, except he says, "Now, you and Munson
83 reorganize that, and, of course, you will have to work hard. I want you to be honest about it. I don't want any 'beating' about it." He had trouble enough, he said. He understood I was a reliable man. I hadn't much money and he wanted to help all he could. When Mr. Cotzhausen asked me how much money I had to turn in or to reduce the indebtedness, I said I can raise about $1,500 in a couple of weeks. "Well," he says, "I want it now." I says, "I have not got it now." Says he, "We had better make a thirty-day note for the $1,500." I says, "Well, I could turn in some accounts on account and also give him on that note a conditional deed." That was a distinct thing. That was done and Mr. Cotzhausen will remember it, too.

We reorganized the Chicago Lithographing Company. They elected me president and made a bill of sale, which is the same put in evidence, from the American Oleograph Company to the Chicago Lithographing Company, and we went at it—Munson and me. The others had no active management in it. Munson and me took charge of it and run it under the name of the "Chicago Lithographing Company." This name was shown on the sign which was put up over the place of business, upstairs and down-stairs, and on bill-heads, cards, and letter-heads. My cards had on "Frank Kerting, president," and some of the cards nothing on, only "Chicago Lithographing Co." The business was carried on in this way until the foreclosure of the mortgage. I did not at any time carry on this business as Frank Kerting individually. I gave up my whole time and energy to the new business. In regard to the floating debts against the concern, after the new company took possession of the business a lot of debts came in. We also paid in reduction of these outstanding mortgages to the Cleveland Paper Company close upon $1,500, and Mr. Cotzhausen received about $4,200, and a lot of other debts was paid, about $2,000 more.

About in the month of Sept., 1880, Mr. Sylvester came down and put a custodian in possession and left word that I should come to
84 Mr. Baldwin's office. I went there. Mr. Sylvester said, "Now, we have concluded it is about time to foreclose this. You have done well—better than we expected you could do—but there might be some trouble with the people that used to be connected with the oleograph Co. Mr. Cotzhausen thinks it is best to foreclose and make new papers and wipe out the old mortgage. That was all that was said. Everything was all fair and he kept the custodian in and foreclosed. Mr. C. came down a day or two before the foreclosure and says, You ought to raise more money—reduce this quicker. I want it reduced down to $8,000. "Well," I says, "I will see if I can get somebody in here with more money. We have a good business now."

He led me to believe until the very minute it was foreclosed that he does it so as to protect me, until after it was done.

On the sale I bid the property off at $10,000. The last preceding bid was $9,000 or $9,500. "Then," says he, "have you any money?" I says, "I don't know. Why?" Says he, "We don't want no fictitious bids." He bid again and bid it in at $6,000.

I first heard of Mr. Cotzhausen claiming anything of me personally as growing out of these transactions about two months ago. I never heard of any such claim being made against me before this suit. I didn't promise individually to pay this debt of the American Oleograph Company, directly or indirectly. We never spoke about it. The equity bill which I filed in Chicago in the superior court came to be filed as follows:

I explained to Mr. Barker (my attorney) the transactions at the time—just what happened. He thought, "Your work in there is worth a great deal and you ought to have a personal claim." I say, "But that was not mentioned at the time; he just merely wanted somebody in charge of the business—wanted it out of the other fellows' hands." Barker said, "I understand that." That is about the way. Mr. Barker got it in that way. I told twice or three times that way, that Mr. C. didn't mention the words selling to
85 me or anything of that kind.

On cross-examination the witness testified:

I didn't write the bill myself. It is not true, as stated in my bill of complaint in the superior court, that C. sold me the mortgaged property right out, and that I agreed to pay for it. That is not the way it was. I was also sworn on the trial of that case in my own behalf, and among other things then testified in support of my bill:

"I first became acquainted with Mr. Cotzhausen in the office of the American Oleograph Company on the 18th of November, 1879. He spoke to me, saying that he had something on his hands—had a business on his hands that he was obliged to take away from the fellows that run it, as they were dishonest and he could not rely on them, and he had it now and wanted to dispose of it; that he had been obliged to take it away from them; that he foreclosed the mortgage and he wanted to get a man that was honest and would

take care of the business—to take it off his hands, as he was a lawyer and he could not be in Chicago and in Milwaukee too. He asked me whether I would like to take it off his hands. Well, I told him I might if everything was satisfactory. Of course, I didn't know much about it—about the particulars—and I would have to see. He said he would sell it to me for the total of those two matters, referring to the Cleveland Paper Co. mortgage and the second mortgage. I was to pay $75 a week until it is all paid for. Well, I say I think I could do that—I think I might do that. I introduced Mr. C. at Baldwin's office and said we had a little business, and then Mr. Cotzhausen did all the talking. He told Baldwin that he had been in very bad hands and had something on his hands he couldn't take care of. He was a lawyer in Milwaukee and he could not take care of a business here; he had sold it to me on an easy plan, so that he would eventually get his money out of it. That is just about so many words he said, and then I
86 told him, "Yes, I want to give a note for thirty days and to secure it until that is paid by a conditional deed." Mr. Munson was with us.

"After that I went right ahead to work and ran the business and told the men that I had got charge of it and put them right to work. I took charge the same day that he turned it over to me, at noon, and I continued the business until the 25th of September, 1880. No one had any interest as owner in that property between the 18th of November, 1879, and the 25th day of September, 1880, except myself. The business was conducted in my own name. I used the name of the Chicago Lithographing Co. afterwards because I had been known for years as connected with the Chicago Lithographing Co. and the old business that I was in; they called it by that name and people knew me that way. No one had any interest in that company but me. I bought goods and most of the paper in my name from the Butler Paper Company. They were billed Frank Kerting. Sometimes they called it Frank Kerting, president, Chicago Lithographing Company. They looked to me for it."

The witness thereupon continued to testify:

I knew that Mr. C. wanted a good, reliable, honest man to go in there. He told me that he could not leave the business any more in the other people's charge. The conversation with Mr. C. about reorganizing in the name of another company was had at Mr. Baldwin's office. Mr. Munson put the question, "Now, then, Mr. C., we take this new company's name and run it in the new company; how about that?" Mr. C. said: "I have no objection to that. You can do that, whichever way is best. You had better do that way."

The company had been organized before. The charter was in existence for two or three months at that time and Mr. Munson was one of the officers. I could not say whether Mr. Cotzhausen was present when the bill of sale from the oleograph Co. to the lithographing Co. was made, but you told me to make it that way that was done. I was not present. I never subscribed to any
87 stock. I could not swear that I never was a stockholder in

the company. They elected me president. I don't know that I ever had any certificate of stock. They claimed they made it out and had it ready for me. I know stock was subscribed because I saw the subscription list, but about the issuing of stock I don't know. What was turned in was supposed to go to the company, was to be accounted for as more or less stock eventually. That was the understanding. The precise agreement between Mr. Munson and myself was made in Baldwin's office in the presence of yourself (Cotzhausen). He was to get so much salary and I was to get so much; he was to be the treasurer and I was to be the president, and I do not now remember how much each was to get, but he was to bring in his share of the money in about 30 days. The exact wording I do not know any more. Mr. Munson was to bring us his money, but he refused or he didn't bring in his share and I had all the risk and I had other friends. He eventually went out in April, 1880. There were other directors of the Chicago Lithographing Company after November 18th, but I am not sure about it.

The books were kept in the name of the Chicago Lithographing Co. " and you (Cotzhausen) have one of them."

Waltersdorf also gave his name to the Co. to get stock for it. You (Cotzhausen) signed the notes yourself. He gave his notes towards stock that was to be issued and went actively into the business. The directors of the Co., I guess, were Swain, Bennet, Thurber, Cowes, and Munson. I was informed I was elected president.

In regard to paying you much faster than $75 per week, I said " We could on such a business. A business that could not pay that is not good for anything." I said to Munson, " We can do better than that."

The reason why I pay that $1,500 to you on account at that time was you said you ought to have some additional security, and asked me if I had any money to turn in or to reduce that amount some. I said I might pay $1,500 in a couple of weeks. You said you wanted it now. I said I have not got it now, but I have
88 some accounts I can turn over and I could leave a deed with you conditionally to secure the $1,500.

Whereupon plaintiff rested.

In rebuttal F. W. COTZHAUSEN was recalled and testified:

At the foreclosure sale the property was allowed to be struck down to Mr. Kerting for $10,000, being about $1,000 less than the amount actually due at the time, but Kerting did not pay even five per cent. to bind the purchase, and the property was offered for sale again and bought in by the mortgagee at $6,000.

Being interrogated about his answer in the suit in the superior court, the witness states:

The answer was intended to confine itself to the issue then before the court. He meant to deny that he made a sale to Kerting in the way in which Kerting states it to have been made, or that C. was

the owner of the property at the time and sold the business to him (Kerting). The particular agreements which Kerting set up in his bills I meant to distinctly deny, but that Kerting became a substituted debtor, and that he agreed to assume the debt and to make it his own and to be and remain individually responsible for its payment, that I meant to assert.

Thereupon both parties rested.

The foregoing was all the evidence offered on said trial by either party which is material to the issue and the questions here presented.

And because the foregoing evidence does not appear of record the judge of this court does on this 12th day of October, 1887, settle, sign, and seal this bill of exceptions and does hereby certify that, by consent of the parties and leave of the court on application granted, the settlement of said bill of exceptions has been from time to time necessarily adjourned from the 17th day of August, 1887, to the present time.

CHAS. E. DYER, *Judge.* [SEAL.]

89 UNITED STATES OF AMERICA, *Eastern District of Wisconsin,* } *ss:*

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate with their originals now on file and remaining of record in my office, and that they are true copies of such originals and correct transcripts therefrom, being a transcript of the record in the case of Frank Kerting *vs.* F. W. Cotzhausen.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in said district, this 13th day October, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the 112th.

Seal U. S. Circuit Court, Eastern District Wisconsin.

EDWARD KURTZ, *Clerk.*

90 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of America for the eastern district of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between Frank Kerting, plaintiff, and F. W. Cotzhausen, defendant, a manifest error hath

Seal U. S. Circuit Court, Eastern District Wisconsin.

happened, to the great damage of the said F. W. Cotzhausen, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error that of right and according to law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this first day of July, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the 111th.

EDWARD KURTZ,
Clerk U. S. Circuit Court, Eastern Dist. of Wisconsin.

[Endorsed:] Filed July 1, 1887. Edw. Kurtz, clerk.

91 UNITED STATES OF AMERICA, *ss*:

To Frank Kerting, Greeting:

[SEAL.] You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Wisconsin, wherein F. W. Cotzhausen is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Charles E. Dyer, district judge of the United States for the eastern district of Wisconsin, at the city of Milwaukee, this 1st day of July, A. D. 1887, and of the Independence of the United States the 111th.

CHAS. E. DYER, *Judge.*

Service of above citation is accepted this 7th day of July, A. D. 1887.

G. W. HAZELTON,
Att'y for Pl't'ff.

Endorsed on cover: E. Wisconsin C. C. U. S. No. 250. F. W. Cotzhausen, plaintiff in error, *vs.* Frank Kerting. Filed October 17, 1887.

Office Supreme Court U. S.
FILED,
MAR 23 1891
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1890.

F. W. COTZHAUSEN, PLAINTIFF IN ERROR,
v.
FRANK KERTING.
No. 250.

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

Brief for Plaintiff in Error.

(References are to marginal pages.)

I.

STATEMENT OF CASE.

Frank Kerting obtained in November, 1885, an Illinois judgment against plaintiff in error, a resident of Wisconsin, and for the collection thereof he commenced his action at law on June 14, 1886, in the U. S. Circuit Court, for the Eastern District of Wisconsin.

Several questions arose upon the pleadings, which need

not now be noticed. The controversy turns upon a counter-claim, which was rejected by the court below.

The counter-claim will be found at pages 16–19, printed record. The defendant interposed a general denial (page 21). As the decision mainly involved questions of law, a jury trial was waived in writing (24). By bill of exceptions all the evidence has been preserved (60–88).

"Concerning most of the material facts there does not "appear to be a serious disagreement between the parties, "except in relation to the alleged personal assumption by "the plaintiff, Kerting, of the mortgage indebtedness." (Dyer, J., 53.)

To charge the plaintiff with personal liability, the court should be satisfied by the weight of evidence that Kerting, either expressly or by clear implication, intentionally assumed, as his own, the debt in question. (Dyer, J., 54.)

The court found that such a promise and assumption of the debt could neither be deduced from the writings nor was such agreement proven by such a preponderance of the testimony as is essential to a recovery (45).

The opinion of the court is given at length on pages 38–55. No dispute arises upon the facts therein summarized; it is the conclusion of the court below of which plaintiff in error complains.

II.

ASSIGNMENT OF ERRORS.

1. The court erred in deciding that Kerting did not personally assume and agree to discharge the existing encumbrances.

2. Whatever may be the facts or the law bearing upon the foregoing proposition, the court ought to have awarded

at least damages for failure of title, because Kerting turned out a worthless security and thereby obtained valuable advantages to the detriment of the mortgage holder.

III.

POINTS AND ARGUMENT.

Our reasons for excepting to the decision below are concisely set forth on the motion for rehearing, pages 32-35. We have but little to add by way of argument or authority.

The following facts are quoted from the opinion in the language of the court below :

C. is the holder and beneficiary of a *second* chattel mortgage, in the terms whereof default has been made and which he proceeds to foreclose. The mortgagor could not proceed with its business without a reorganization on a more substantial basis. The assets of the Company, covered by the mortgages, were *more than adequate security* for the payment of the indebtedness, *if the business could be kept on foot* and the expenses reduced (40). K. was then carrying on a lithographing business on his own account in the same building and a man of experience in the business (41). There was then in existence a corporation, with which K. was then or became subsequently connected, known as the Chicago Lithographing Company. C. and K. met, and at once entered into negotiations for the continued prosecution of the Company's business. C. testifies that " during these negotiations K. begged to be given an opportunity to assume charge of the business, and agreed to assume payment of the debt *and to discharge the same even faster than the obligations then existing called for*, and that he (Cotzhausen) agreed to put K. in his shoes

as against the Company and transfer titles, when he had paid enough to cover the amount which remained over" (50). This testimony seems to be corroborated by Kerting's cross-examination (54). On the other hand, K. asserts that there was "never a word spoken in any shape about individually assuming the debt of the Am. Oleograph Comp." (53).

However, at the end of these negotiations we find the following undisputed state of facts:

K. gave in immediate reduction of the mortgage indebtedness his individual note, 30 days, for $1,500, and turned over additional securities, among which a deed of certain real estate, absolute upon its face, but in fact as security merely. This part of the agreement is evidenced by writing and not open to dispute (42–43).

Power of sale absolutely and unconditionally to dispose of the premises (the real estate thus conveyed) was given in case of default with either the terms of the said note or *chattel mortgage*. And *upon satisfaction of the said chattel mortgage debt* C. also agreed immediately to reconvey with warranty against his own acts, and to *assign to Kerting at any time, upon demand and proper payment therefor*, the chattel mortgage or other securities now held against the American Oleograph Company (42–43).

Upon the execution of these papers the custodian in possession was withdrawn, the foreclosure suspended, other profitable arrangements abandoned, and the Chicago Lithographing Company took charge of the business and property, the plaintiff Kerting exercising control as president of the same (43) and purchasing goods for the business, sometimes in his own name and sometimes as the president of the Company (54).

After continuing the business under Kerting's management for some ten months, it became again necessary to

foreclose. There was realized on the sale $6,000, thus leaving a balance on second chattel mortgage of $5,147.58, which C. now seeks to recover by way of counter-claim (45, 80).

It also appears from the undisputed evidence that after this foreclosure sale a great deal of litigation ensued between the parties. K. filed his bill in the Chancery Court in which among other things he alleged :

"That on November 17, 1879, Cotzhausen took possession of and foreclosed the property described therein, which was all the property of the said Company, and that Cotzhausen, then and there claiming to be so in possession of said property and to be the owner thereof, offered to sell to your orator all of the said property, representing that the same was free from all encumbrances of any kind whatsoever, except a mortgage to the Cleveland Paper Company, and that the American Oleograph Company owed in small debts not to exceed $200.00 ; that there was actually due upon the first mortgage only $6,800.00, and that, relying upon the said statements and representations of said Cotzhausen, your orator *bought the said property of said Cotzhausen ;* that the *purchase price at which said Cotzhausen sold said property and the same was bought by your orator* was the amount actually due upon the mortgage to the Cleveland Paper Company and the amount actually due upon the note to Sylvester, trustee, and the accrued interest upon the same ; that it was then and there agreed by and between said Cotzhausen and your orator that *your orator was to pay* said Cotzhausen upon said purchase price the sum of $75.00 in each and every week *until the whole amount* due to the said Cleveland Paper Company and upon the note to said George Sylvester, trustee, was fully paid ; and said Cotzhausen then and there agreed with your orator that he would protect him against the the said mortgage to the Cleveland Paper Company and save him and the property bought by him, your orator, harmless therefrom, and that in consideration of said

" representations, undertakings, and agreements on the " part of said Cotzhausen with your orator your orator " executed the promissory note for $1,500.00 and caused " to be executed a deed from Baldwin to George Sylvester, " trustee."

In the course of this litigation, by way of cross-bill, Cotzhausen prayed foreclosure of his trust deed for the balance remaining due on second chattel mortgage, which the court then found to be $5,147.58; but foreclosure was denied, because title to the real estate was really in Mrs. Kerting and not in her husband. Thus the security of November 18, 1879, entirely failed (80). The premises were worth $5,000 (64).

In view of these facts, it is somewhat difficult for us to understand why this counter-claim should be rejected. Whatever might be said as to the writings themselves, and their failure fully to express the intention of the parties, certain it is that *these writings throughout corroborate the claimant's statement and version of the case.* If K. did not mean personally to bind himself for this mortgage debt, what then did he mean, when he turned over his individual assets for the payment of the same and the whole thereof? We are ready on this branch of the case to adopt the very language of the court below (53), that, in order to charge Kerting with personal liability, the court should be satisfied by the weight of the evidence that K., *either expressly or by clear implication*, intentionally assumed as his own the debt in question.

C. testifies that K., if permitted to continue the business, agreed to discharge the debt even faster than the existing mortgages called for (69); in his bill of complaint in Chicago (a controversy between the same parties, arising shortly after the happening of these transactions) K. directly places his right of recovery upon the alleged fact

that *he himself virtually became the purchaser* of this mortgaged property, which he bought from C., and that the purchase price was the amount actually due upon the two mortgages, &c. (75–76); and again, when testifying in his own behalf in support of said bill, we find him saying:

"He asked me whether I would like to take it off his "hands. Well, I told him I might, if everything was "satisfactory. He said, *he would sell it to me for the total "of those two mortgages.* Well, I say, I think I could do "that; I think I might do that." (85).

"After that I went right ahead to work and ran the "business, and told the men that I had got charge of. *I "used the name of the Ch. Lith. Co. afterwards*, because I "had been known for years as connected with the Ch. "Lith. Co. and the old business I was in; *they called it "by that name, and people knew me that way.*" (86).

The court will notice that we are not particularly lacking "corroborating evidence," even outside of the writings themselves. What stronger corroborating evidence could be asked than Kerting's bill of complaint and explicit oath in a former controversy between the same parties? Has the maxim of "*Allegans contraria non est audiendus*" become entirely obliterated in the judicial mind? Can a litigant, in the language of Lord Kenyon, be permitted to "blow hot and cold" with reference to the same transaction, or insist, at different times, on the truth of each of two conflicting allegations, according to the promptings of his private interests?

Beyond all question true it is that the foreclosure of the mortgage was desisted from and other profitable arrangements were abandoned on the interposition of this third party, who made a payment of $1,500 on account, and volunteered to secure the balance by further collaterals and resources of his own, on condition that he be given an

opportunity to continue the business in place of the mortgagors.

The case at bar involves more than the purchase of an equity of redemption merely; the former debtor is practically superceded—the mortgages covered all property of whatever kind—another debtor is practically substituted, who reorganizes the business, and who agrees to become responsible for the full amount of the remaining outstanding obligations, when he pretended to secure, by means of his own, the prompt payment of the mortgagor's debt.

Such a promise need not be in writing; it is immaterial, even, whether the original obligation is cancelled or not. No particular form of words is necessary. No *express* promises need be proven; the law will infer a promise from acts and conduct—from what the parties did, as well as said at the time. It is the familar case of a novation under the civil law. The debt remains the same, but *a new debtor* is substituted for the old. Such a novation may be made without the intervention or privity of the old debtor, or by the debtor's transmission of his debt to another, who accepts the obligation and is himself accepted by the creditor.

An agrement that the amount of a mortgage upon the granted premises shall be paid as a part of the purchase money is in effect an assumption to pay the mortgage, and not merely a taking of the property, subject to the mortgage, and any expression which clearly implies an obligation, intentionally created by the one party and assumed by the other, will constitute a personal obligation for its payment.

Jones on Mortgages, 749.

The court below evidently allowed itself to be misled by the case of Hamill *v.* Gillespie (48 N. Y. 556), where, at an

execution sale of personal property, it was announced by the constable as sold subject to a chattel mortgage, and that the purchaser would have to comply with the conditions thereof. *Held*, that, as there was no express agreement proven, and no facts from which it ought to be implied, the purchaser was not personally liable.

The grounds of the decision were that the property was in possession of the mortgagor, the condition of the mortgage was unbroken, and the mortgagor had an interest subject to sale; that no attempt was made to charge defendant on the ground that he had induced the plaintiff to neglect to avail himself of the provision authorizing him to take possession, in case he deemed himself insecure, and the court uses this language: "It might well be held that the defendant, having consented to the announcement, would be estopped from disputing the force and effect of it, in case the mortgagee had been thereby induced to omit to take possession under his insecurity clause."

FAILURE OF TITLE.

The court found "that it is true, as alleged in said counter-claim, that the title to the real estate, alleged in said counter-claim to have been conveyed by the plaintiff Kerting to George Sylvester in trust for the defendant, failed, so that said real estate as security became unavailable to the defendant as alleged in said counter-claim" (30). When such proves to be the case, why is it that the claimant should be remediless? Is this a case of *damnum absque injuria?*

V. COTZHAUSEN,
ENOCH TOTTEN,
For Plaintiff in Error.

Office Supreme Court U. S.
FILED,
MAR 24 1891
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1890.

F. W. COTZHAUSEN, PLAINTIFF IN ERROR,
v.
FRANK KERTING.
No. 250.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

The court below seemed to proceed upon the idea that it was necessary that the defendant, in the trial court, as a necessary prerequisite to a recovery on his counter-claim, should show by a preponderance of proof that Kerting absolutely or by implication agreed to *assume and pay the outstanding encumbrances as such and in any event.* By our brief-in-chief, I think we have shown conclusively that such proof was made by the defendant on the trial in the Circuit Court.

But even on the theory of the plaintiff below, the defendant was entitled to judgment on his counter-claim.

It seems to me immaterial, in the peculiar aspect of this case, whether such an agreement was made in terms or not. If the defendant proved at the trial that Kerting agreed to pay him, at the rate of $75.00 per week, an

amount of money equal to the whole amount then due on the two encumbrances if he would transfer title and put him (K.) in his shoes as against the Company, and that he (Kerting) was put in possession and failed to pay so much by $5,147.58, then, I say, the court below was bound to render a judgment in favor of Cotzhausen for the difference between that sum and the amount due on the Illinois judgment. This was especially the duty of the court, inasmuch as it is an undisputed fact that Cotzhausen had bought in the first mortgage. The question of fact is, how much did Kerting agree to pay Cotzhausen in order to induce him to turn over the property and its business? Cotzhausen was as to all the world, except the Cleveland Company, the owner, and he was in actual physical possession of the entire establishment. The case may be briefly stated thus:

Cotzhausen agreed to put Kerting in his place (35) in reference to the American Oleograph Company, and Kerting agreed to pay him for so doing a sum certain, to wit, the amount due on the two outstanding mortgages, as the purchase price, Cotzhausen agreeing at the same time to save him harmless from, or in other words to pay, the first mortgage held by the Cleveland Company. If Kerting had fulfilled his engagements the Paper Company would have been paid, Cotzhausen would have received his money, and Kerting would have been left free with his property and business.

The true way to reach a right conclusion in a case of this kind is to ascertain the circumstances surrounding the parties at the time, the ends which they wish to accomplish, and what was said and done by them contemporaneously with the agreement.

"Courts, in the construction of contracts, look

> to the language employed, the subject-matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge the meaning of the words and of the correct application of the language to the things described." (Nash *v.* Towne, 5 Wall. 689.)

The insolvent American Oleograph Company was the nominal owner of an engraving and lithographing establishment in Chicago in November, 1879, but the real owners were the Cleveland Paper Company and the plaintiff in error, each of whom owned a chattel mortgage covering all the property of the corporation. The amount due on these mortgages was nearly, if not quite, equal to the full value of the property.

Mr. Cotzhausen's mortgage was the *second* encumbrance; he was, therefore, bound to protect his own debt by taking care of the first encumbrance. The Oleograph Company was in such an embarrassed state of circumstances as to be helpless, and Cotzhausen, in order to save himself, had taken the property into his custody and was about to foreclose. The property, if skilfully managed, was worth as much or more than the amount of the two encumbrances (31), *but skilful management was indispensable.*

In this emergency, Kerting, who was a stranger to C. (31, 32), presented himself as a skilled and successful man in that kind of business (32), and proposed to purchase the entire establishment. *His* object was to become the owner of the entire property. The object of Cotzhausen was to get it transferred to a skilful and successful business man and thus get his money out of the concern. He was a lawyer, residing and doing business in Milwaukee, and

could not have conveniently conducted such a business in Chicago.

The following extracts from the evidence will show what was said about the terms of the purchase agreed upon by the parties.

On the trial of this cause in the court below the defendant Cotzhausen testified as follows (34) in reference to the terms of the agreement:

> "I had nothing to do with the reorganization of the company, and the bill of sale to the Chicago Lithographing Company, which has been introduced, I did not see or hear of until about a year later and when it made its appearance in court. The first general allusion to the policy of reorganizing the business was made at the first interview, when I made the acquaintance of Kerting. He then begged to be given an opportunity to assume charge of that business. He agreed to assume the payment of the debt and to discharge the same even faster, as he expressed himself, than the obligation which then existed called for. He said, in substance, that he would pay that debt a great deal sooner than I could get the money at the present time; *that he would pay* $1,500 *in cash immediately on account; that he would give further security for the balance that might remain, and that I would be much safer in dealing with him than I could possibly be in continuing with the old company.* Words to that effect were repeated and repeated time and time again in a variety of ways. I told Kerting I would accept this proposition. I decided to give him an opportunity to become substituted for the American Oleograph Company. The original debtor should become disbanded, except nominally." (34.)

And further on (35) he said:

> "When this security was given Mr. Kerting agreed to pay the indebtedness then due to me even quicker

than the terms of the original contract called for, and he turned out this trust deed to Mr. Sylvester by way of further security to what he promised, and he made me agree that at any time when he had paid enough to cover the amount which remained over that I would, upon demand on his part, *put him in my shoes as against the company and transfer title.* The agreement of Mr. Kerting to pay this debt ran throughout all conversations. You cannot separate them. Mr. Kerting asked me to give him an opportunity to take charge of and assume that business. I did so and abandoned my previous project; that was settled. The gentleman agreed that he would go in there, expressed a readiness and ability to continue that business and to make it prosper, and he stated in a variety of ways, time and time again, that he would pay me a good deal faster than the old company possibly could have done or the old papers called for, and he pledged payments on account and turned out this further security on his home. This was stated in a variety of ways, but it is all the same thing. The deed that was executed at the time is part of that agreement." (35.)

Previous to the bringing of this present action in the court below, Kerting exhibited his bill in chancery in one of the courts in Chicago, charging upon Mr. Cotzhausen many failures in relation to the agreement made with him by Cotzhausen in relation to this property and business. The pleadings were brought to an issue, and a trial was had. On the trial of that cause Kerting testified in his own behalf. In his evidence at that time (45) he stated the terms of his purchase thus:

"He asked me whether I would like to take it off his hands. Well, I told him I might if everything was satisfactory. Of course, I didn't know much about it—about the particulars—and I would have to see. *He said he would sell it to me for the total of those*

two matters, referring to the Cleveland Paper Co. mortgage and the second mortgage. *I was to pay $75 a week until it was all paid for.* Well, I say I think I could do that—I think I might do that. I introduced Mr. C. at Baldwin's office and said we had a little business, and then Mr. Cotzhausen did all the talking. He told Baldwin that he had been in very bad hands and had something on his hands he couldn't take care of. He was a lawyer in Milwaukee and he could not take care of a business here; he had sold it to me on an easy plan, so that he would eventually get his money out of it. That is just about so many words he said, and then I told him, 'Yes, I want to give a note for thirty days and to secure it until that is paid by a conditional deed.' Mr. Munson was with us."

In his original bill in that equity cause he gave the following version of the terms of the agreement (38, 39), to wit:

"Cotzhausen took possession of and foreclosed the property described therein, which was all the property of the said company, and that Cotzhausen, then and there claiming to be so in possession of said property and to be the owner thereof, offered to sell to your orator all of the said property, representing that the same was free from all encumbrances of any kind whatsoever, except a mortgage to the Cleveland Paper Company, and that the American Oleograph Company owed in small debts, not to exceed $200.00; that there was actually due upon the first mortage only $6,800.00, and that, relying upon the said statements and representations of said Cotzhausen, your orator bought the said property of said Cotzhausen: *that the purchase price at which said Cotzhausen sold said property and the same was bought by your orator was the amount actually due upon the mortgage to the Cleveland Paper Company and the amount actually due upon the note to Sylvester, trustee, and the accrued interest upon the same; that it was then and there agreed by and between*

said Cotzhausen and your orator that your orator was to pay said Cotzhausen upon said purchase price the sum of $75.00 *in each and every week until the whole amount due to the said Cleveland Paper Company and upon the note to said George Sylvester, trustee, was fully paid;* and said Cotzhausen then and there agreed with your orator that he would protect him against the said mortgage to the Cleveland Paper Company and save him and the property bought by him, your orator, harmless therefrom, and that in consideration of said representations, undertakings, and agreements on the part of said Cotzhausen with your orator your orator executed the promissory note for $1,500.00 and caused to be executed a deed from Baldwin to George Sylvester, trustee."

When the time came to pay the $1,500 in cash Kerting failed to produce it. C., in his testimony (34), says:

"When the promise to pay $1,500 in cash came to be reduced to writing and to be carried out the next day, he modified it somewhat, but payments were made by him in the course of time to the extent of $1,500. We went to Baldwin's office, who was Mr. Kerting's attorney, the next following day to consummate the transaction by the payment of cash and the execution of papers relating to further and additional security. Mr. Kerting gave a note for the $1,500, which was fully paid in instalments by the 23d day of December, 1879; this note was secured, or intended to be, by the trust deed to George Sylvester and a number of outstanding collections, which were placed in the hands of Mr. Baldwin to be applied on the note as soon as realized. Kerting had agreed to pay this $1,500 in cash, but when the matter came to be consummated the next day he didn't have the cash, but he said he had outstanding accounts which would be paid on presentation. I refused to meddle with them, and so he made the note and placed those accounts in the hands of Baldwin for collection, who

agreed to turn the money over to me on account of the $1,500, less his collection fee and some $75 costs of foreclosure."

The written agreement made by the parties all support the claim of the plaintiff in error, and corroborate his right to recover on his counter-claim.

When it turned out that Kerting could not produce the *cash* which he had agreed to pay, he offered as security some real estate; this was offered to secure the payment of this $1,500, and also for the fulfilment, on his part, of the entire bargain.

Although the agreements in writing, signed and delivered by the parties, do not mention that Kerting was to to assume and pay the outstanding mortgages, yet the agreement amounts to the same thing, and the agreement was part of the consideration. He agreed to pay *the amount due on them to Cotzhausen*, who practically owned and held them both. The true consideration may be shown by parol evidence.

The considerations expressed in the various agreements are not conclusive; parol evidence may be introduced to show the real or other and additional considerations.

Drury *v.* Tremont Co., 13 Allen, 171.
Hitz *v.* Bank, 111 U. S. 722.
Sherris *v.* Craig, 7 Cr. 51.
Sykes *v.* Chadwick, 18 Wall. 141.
Bump. on Fraud Convs. p. 557 & 9.
Ballard *v.* Briggs, 7 Pick. 333.
Rowle on Cov., 66 and note.
1 Jones on Mortgs., § 750.

The deed from Baldwin and wife mentioned on page 33 of the record was made and delivered as additional security for Kerting's performance. Its terms support the view of

the case I have suggested. When the amount of the encumbrance was paid, then the mortgage was to be assigned by C. to K. The deed of defeasance there (p. 33) set out shows this. It recites that for the purpose of *reducing the amount of said indebtedness* secured by the chattel mortgage of the American Oleograph Company, a note of $1,500.00 has been given by Frank Kerting, and that an unconditional deed was also made by him with power of sale "*in case of default with either the terms of said note or chattel mortgage.*" This deed also provides (33, 34) as follows:

> "If, however, said premises should not be protected by said Frank Kerting against foreclosure of mortgage therein existing or other encumbrances hereafter acquired by way of taxes or otherwise, the right to sell and dispose of said real estate shall become immediately vested, and the proceeds may then be applied to the payment or reduction of the aforesaid note *or chattel mortgage or both*, in so far as justly applicable thereto.
>
> "Upon satisfaction of said chattel mortgage the undersigned agrees immediately to reconvey the premises to the order of Frank Kerting, with warranty against his own acts; also *to assign to him at any time, upon demand and proper payment therefor, the chattel mortgage or other securities* now held against the American Oleograph Company."

The $1,500.00 "was fully paid in instalments by the 23d day of December, 1879." (34.)

It seems to me plain that Kerting bought this property from Cotzhauzen who was in possession of it, and whose rights were subordinate only to the holder of the first mortgage; against this first mortgage Cotzhausen agreed to hold Kerting harmless; Kerting himself swears to this (42). Hence Cotzhausen was in all respects, so far as this controversy is concerned, the owner of both encumbrances.

Kerting agreed to pay as the purchase price, as he stated in his original bill, and as he testified in his oral examination on the trial of the chancery cause in Chicago, "the amount actually due" on these two chattel mortgages (39, 45). This was the purchase price which he agreed to pay *to Cotzhausen*, and he agreed to pay it at the rate of $75 per week. "*I was to pay* (he swears) $75 *a week until it was all paid for*" (45). This being so so, why is Kerting not bound, both legally and equitably, to pay the balance of that sum?

That which was "done" by the parties corroborates this conclusion. Kerting was put in possession and continued the business for a long time. The old corporation was practically abandoned (32). The documents signed by the parties, as said above, sustain the theory of the plaintiff in error. Although none of them contain an absolute undertaking, in direct language, on the part of Kerting, to assume and pay the outstanding encumbrances, the conclusion that he did buy the property and agree to pay the amount thereof is inevitable. He surely did agree to pay to Cotzhausen the amount of the two encumbrances, principal and interest, and for the purposes of this case this is sufficient. It is wholly immaterial whether or not K. agreed to pay the encumbrances if it is true that he agreed to pay to Cotzhausen the amount of them. If this claim had been brought against Kerting by strangers holding either mortgage, there might have been some plausible ground for Kerting's defence. But Kerting admits that he did actually promise to pay Cotzhausen this sum of money. That he has not paid it to him there is no dispute. Why was it not a just offset to this judgment?

Cotzhausen had been obliged, in Feby., 1880 (36), to buy in the mortgage of the Cleveland Paper Company, and Kerting having failed in his performances another

agreement was made dated Feby. 28, 1880 (37), by which Cotzhausen bound himself to extend the time and give further day of payment, if Kerting would reduce the amount of the whole indebtedness to $10,000.

Kerting, however, did not pay anything beyond the $1,500, except two payments of

June 15, 1880.....	$1,421 11
Aug. 12, 1880.....	1,180 40
	$2,601 51

In September, 1880 (38), Cotzhausen caused the *first* mortgage to be foreclosed; then Kerting began the equity proceedings in chancery before mentioned (38).

It is proper to notice here another fact in the case. On the 19th of November, 1879 (32), the affairs of the moribund corporation, the American Oleograph Company, made a transfer or bill of sale of all its property, subject to the two chattel mortgages, to the Chicago Lithographing Company, a shadowy concern, which seems to have been but another name for Kerting. Cotzhausen knew nothing of this Lithographic Company (34) nor of this bill of sale until several months had elapsed (36). This Lithograph Company was a mere subterfuge.

Kerting tells us that, after the agreement between him and Mr. Cotzhausen, he took charge of the business and exclusively controlled it. He says (45):

> "After that I went right ahead to work and ran the business and told the men that I had got charge of it and put them right to work. I took charge the same day that he turned it over to me, at noon, and I continued the business until the 25th of September, 1880. No one had any interest as owner in that property between the 18th of November, 1879, and the